United States Court of Appeals

for the Second Circuit

JOINT APPENDIX

76-7021

In The

United States Court of Appeals

For The Second Circuit

13
P/S

FREDERIC P. WIEDERSUM ASSOCIATES,

Plaintiff-Appellee,

vs.

NATIONAL HOMES CONSTRUCTION CORPORATION,

Defendant-Appellant.

On Appeal From the United States District Court for the Eastern District

JOINT APPENDIX

Volume III, pp. 527a - End

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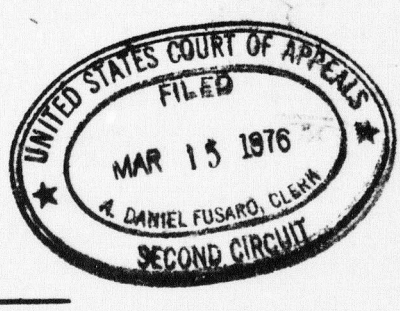

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TABLE OF CONTENTS

	Page
Docket Entries	1a
Petition of Removal (with Complaint)	4a
Answer	14a
Defendant's Notice to Produce	18a
Plaintiff's Notice to Produce	20a
Plaintiff's Interrogatories	21a
Defendant's Answers to Interrogatories	23a
Deposition Testimony of William G. Laverty on September 16, 1974	27a
Deposition Testimony of Floyd J. Payne on February 27, 1975	42a
Deposition Testimony of Arvil Duley on February 28, 1975	54a
Affidavit of James C. Woolery, sworn to October 13, 1975	73a
Exhibit	
A - Agreement dated March 29, 1971 between National Homes Construction Corporation and Frederic P. Wiedersum Associates	77a
Affidavit of Floyd J. Payne, sworn to October 16, 1975	84a
Exhibits	
A - Letter dated January 23, 1973 from William G. Laverty to John Gleason	89a
B - Letter dated January 29, 1973 from John Gleason to William G. Laverty	90a

Page

Affidavit of Harry L. Simmons, sworn to November 3, 1975..... 91a

Affidavit of Thomas C. Morrison, sworn to November 13, 1975..... 96a

Exhibits

14 - TWA receipt dated March 30, 1973..... 97a

15 - Letter dated March 30, 1973 from William G. Laverty to Orville Duley..... 98a

16 - Memorandum dated March 30, 1973 of William G. Laverty..... 99a

19 - Letter dated April 4, 1973 from William G. Laverty to Floyd Payne..... 100a

20 - TWA receipt dated April 5, 1973..... 101a

Affidavit of Albert H. Voorneveld, sworn to November 14, 1975..... 102a

Affidavit of Arvil Duley, sworn to November 18, 1975..... 104a

Exhibit

A - Letter dated March 30, 1973 from William G. Laverty to Orville Duley..... 106a

Affidavit of William G. Laverty, sworn to November 19, 1975..... 107a

Memorandum and Order dated November 21, 1975, Hon. Walter Bruchhausen, U.S.D.J..... 108a

Defendant's Trial Memorandum..... 112a

Plaintiff's Request for Jury Instructions..... 140a

Defendant's Request for Jury Instructions..... 160a

Judgment entered December 12, 1975 on Jury Verdict..... 166a

Page

Trial Proceedings

Plaintiff's Opening Statement..... 167a

Defendant's Opening Statement..... 169a

Plaintiff's Witnesses

William G. Laverty:

Direct..... 172a

Cross..... 242a

Redirect..... 274a

Recross..... 290a

Albert H. Voorneveld:

Direct..... 292a

Cross..... 319a

Redirect..... 339a

Recross..... 339a

Frederic G. Wiedersum:

Direct..... 342a

Cross..... 353a

Redirect..... 380a

Recross..... 381a

Plaintiff's Motion Pursuant to F.R.C.P. Rules 8 and 12..... 382a

Defendant's Witnesses

John Gleason:

Direct..... 386a

Cross..... 485a

Page

Redirect..... 552a

Recross..... 570a

Further Direct..... 573a

Michael Bolka:

Direct..... 574a

Cross..... 605a

Redirect..... 634a

Recross..... 642a

Arvil Duley:

Direct..... 644a

Cross..... 661a

Redirect..... 667a

Request to Introduce Pleadings; Reading of Defendant's Answer to Interrogatory..... 667a

Plaintiff's Rebuttal Witnesses

William G. Laverty:

Direct..... 669a

Cross..... 670a

Albert H. Voorneveld:

Direct..... 673a

Cross..... 678a

Defendant's Request to Call John Gleason..... 682a

Defendant's Request for Proposed Charge Prior to Summation..... 688a

Defendant's Summation..... 689a

Page

Plaintiff's Summation..... 714a

Charge to Jury and Objections..... 746a

Verdict; Motion for Judgment Notwithstanding Verdict and Motion for Reduction in Amount of Verdict..... 761a

Trial Exhibits

Plaintiff's Exhibits:

2 - Memorandum of William G. Laverty dated December 20, 1972..... 763a

3 - Department of the Navy Notice of Request for Proposals dated January 16, 1973..... 765a

4 - Letter dated January 23, 1973 from William G. Laverty to John Gleason..... 766a

5 - Letter dated January 29, 1973 from John Gleason to William G. Laverty..... 767a

6 - Letter dated February 7, 1973 from William G. Laverty to Floyd Pyan..... 768a

8 - Memo dated February 21, 1973 to John Gleason from Floyd Payne..... 769a

10 - Memo dated March 12, 1973 to John K. Abrahamsen..... 770a

23 - Letter dated April 3, 1973 from Albert H. Voorneveld to John Gleason..... 771a

24 - Letter dated February 24, 1972 from Albert H. Voorneveld to John Gleason..... 772a

26 - Memorandum dated June 11, 1971 of T. Fitzpatrick..... 773a

27 - Memorandum dated June 14, 1971 of N.J. Wiedersum..... 774a

Page

28 - Letter dated June 15, 1971 from James C. Woolery to Norman Wiedersum..... 775a

29 - Notice from Department of the Navy of June 15, 1971..... 776a

30 - Memorandum dated June 22, 1971 of T. Fitzpatrick..... 777a

31 - Memorandum dated June 24, 1971 of N.J.W..... 778a

Defendant's Exhibits:

D - Tally sheet listing plaintiff's employees and hours..... 779a

E - Memorandum dated September 25, 1974 to Norman J. Wiedersum from Arthur Van Suetendael..... 780a

F - Schedule listing hours of William G. Laverty..... 781a

G - Statement of time allocation of A.H. Voorneveld..... 782a

H - Report dated October 1, 1974 of time spent by Frederic G. Wiedersum..... 783a

K - Memorandum of Michael Bolka (as admitted into evidence)..... 785a

K - Memorandum of Michael Bolka (as marked for identification)..... 786a

Q You mentioned yesterday a Mr. Wilton, Budd Wilton?

A Budd Wilton, that's correct.

Q Was he involved?

A Budd Wilton did not work for National Homes. Budd Wilton worked for Engineering Plan Services. I believe that was the correct name for it. They were an independent engineering company. They prepared jobs exactly under the same terms as Wiedersum, the engineering drawings. The site plan drawings, etc., that go into our site development plans.

Q For the other projects?

A For other projects.

Q That was mainly what he was doing during this time?

A That was all he was doing.

Q Did you mention Mr. Smith yesterday?

A Mr. Smith, yes.

Q Who is he again?

A He was with National Homes Manufacturing Corporation.

Q I see, he worked under you or with you?

A Under me, yes. Also, under Lindstrom.

Q They were involved in all the ones that were in the construction phase?

A Under construction, no. They were not themselves. For the simple reason National had or fabricated -- the fabrication plant nearest to the project would be the fabrication plant that would be doing the manufacturing.

In the case of the New York project that would be coming out of the Horse's Head plant.

In the case of the Georgia project, that would be coming out of the Thomson plant.

In the case of the Illinois project, that would be coming out of the National manufacturing plant.

Q Now are the procedures roughly the same in all these other turnkey projects that your company is involved in, and by that I mean you get a notice from the Government and then you had a pre-proposal conference and then you have time to put in a bid. That is the general procedure?

A The procedures are precisely the same on each and every project we bid. Whether it be a turnkey for the Government or a turnkey for U.D.C. or a turnkey for HUD. We followed exactly the same procedures.

Q Now in all these other projects, where you were following the same procedures where National Homes Construction Company normally decides whether it's going to put in a bid --

A As I said, the final determination, the absolute final determination as to whether a bond is going -- a bid bond is going to be requested and whether the bid is going to go in is made the night or two days prior.

In other words, if the bid went in on a Friday the decision would be made Thursday night when all the figures were finalized.

Q And not before that?

A That is affirmative.

Q Isn't it a fact that the decision is formally made after, shortly after the pre-proposal conference?

A Absolutely not. Absolutely not.

Q Mr. Gleason, I read to you from the deposition of Mr. Floyd Payne in this case. He was asked about this and he testified as follows:

"Question: Going back to the first time that you discussed this matter with Mr. Gleason, did National inform Wiedersum of what National's interest in this project was? What it was they wanted and hoped to do?

"Answer: No. I don't recall the specifics. Normally, there is no decision made as to what our thinking would be or what our approach would be until after the pre-proposal conference.

"Question: You mean your thinking as to whether or not you actually go after the bid?

"Answer: Right.

"Question: That decision is normally made after the pre-proposal conference?

"Answer: Right."

A little later there is a question:

"Question: You say National normally --"

MR. MORRISON: Strike that.

Q "Question: Would that, I am talking about National, excluding this particular deal, that is decisions were normally made in conjunction with the other parties such as the engineering firm that you referred to previously or could National consult with the other parties --

"Answer: I cannot answer that because I was not in a position to know. The only word I would get would be a decision to proceed or not to proceed. What agreement with anybody or such I have no knowledge.

"Question: You say normally the decision would be made after the pre-proposal conference. Who would make that decision?

"Answer: My immediate superior. In this case, John Gleason would advise me whether or not it was a

corporate decision to proceed or drop it."

Was there anything different about this procedure that would call for different procedures to be followed?

A First of all, I would like to make one thing clear. That is not my deposition.

Q Yes?

A I have not made a deposition on this case. I would also like to make the matter clear. You are not construing the interpretation of that as it has been carried out here. We made two decisions literally on every job. The first decision as to whether we would propose to proceed along in putting in a bid together would be made after the pre-proposal conference.

I repeat, our decision to put in a bid to go would be made after the pre-proposal conference. Our decision to submit a bid to finalize and submit a bid would be made only two days prior.

Now we had jobs that we take to the stage of two days prior and we drop them.

Q And it is your testimony that that's what Mr. Payne intended to say?

A That is exactly what he intended.

Q I see. You know that is what he intended?

A That's all he could have intended because he had no authority to do otherwise. He had no authority to make any commitment. He was not questioned or consulted on whether we should.

Q You weren't at Mr. Payne's deposition?

A Pardon?

Q You weren't at Mr. Payne's deposition?

A I was not.

Q Now you mentioned yesterday, about a short time span on this particular project.

That there is time constraints in getting this whole thing together?

A Will you repeat that again?

Q Yes. I believe you testified yesterday that this whole project was under a time restraint in that you had a very short time to put the entire package together.

A No. I did not. I believe I testified that this project as far as the overall time span was different than any other military project.

I testified yesterday that the time from which we were -- we secured the final plans, which as you have stated is March 30th, the time span at that time would have made it absolutely impossible for us to complete a bid and put in an accurate bona fide justifiable bid that we could

live with.

Q But as far as the overall time span from the time you first began working on the project with Wiedersum until the time the bid was due there was nothing unusual about that?

A Certainly nothing unusual about it.

Q You normally only have thirty to forty days to do this entire thing?

A Absolutely, absolutely. I think if you go back to some of the testimony that was given here, it came out that the pre-construction meeting, that the time was even shorter than this at the time and the other proposers had made a request for an extension of bid time. Said request was denied.

Q So in other words, if anybody were to say that the overall time restraint on this project was shorter than the normal military projects, that would not be true?

MR. SIMMONS: Objection, your Honor.

THE COURT: I will sustain it as to form, counselor.

Q Now let's talk for a minute about -- about the mechanics of pricing which we went into just a little bit yesterday.

I believe it is your testimony that on the

basis of the preliminary plans you can go out and begin pricing with subcontractors?

A It was my testimony yesterday and it is my testimony today that we can go out and we can secure preliminary unit prices in a given area to determine, for example, what is concrete running for by the yard. What is dry wall running for by the square foot? What is the installation cost? What are the labor costs. Because even though at the pre-construction conference they issue what is known as a minimum wage scale for a given job.

It really becomes insignificant because the wages are such that for example they may say that a laborer, a common laborer, you will pay him a minimum of $2.50. A carpenter you may pay him $3.50 minimum. You cannot rely on that mainly for the simple reason that you can go into areas that are highly unionized. You may be paying a carpenter $5.50 and you may be paying a laborer $3.75. The determination is made after a man goes in there with his preliminary plans.

Q You don't have to wait until the final plans to find out what the wage rate for carpenters is?

A We did not wait until we had final plans.

Q And nothing really changes after you get the final plans?

A Most assuredly it changes. You are

misinterpreting. What goes into the make-up of the final bid bond, we must have the unit prices to the extent -- are items that would be extended out unit prices. We must have a bona fide subcontract bid from the subcontractors. They are going to do a given labor and material job. Now, that cannot be arrived at until they are given the final plans.

Q Isn't it a fact after you have the final plans all you have to do is reconfirm the price that you already have received?

A It's not a fact. It is not a fact. You cannot secure, you cannot secure a firm bondable bid from a subcontractor that is going to do a labor and material portion of that contract until he has seen the final plans. Because what -- when he submits you a bid with a bid bond, he is submitting that bid with the agreement that he'll do that job per the final plan for X number of dollars.

Q Mr. Gleason, I'll read you what Mr. Floyd Payne said under oath about this question.

This is an affidavit by Floyd J. Payne which was submitted to the Court. I'll just read the preliminary part and get to the point.

"Floyd Payne, being duly sworn says I am the Project General Manager with the defendant National Homes Construction. I have knowledge of the facts

herein stated and make this affidavit."

I will leave out the rest.

Now going to paragraph 86 in this affidavit, Mr. Payne says as follows:

"In order to have afforded the defendant sufficient time to review the final plans and to obtain reconfirmation from subcontractors, final plans should have been in defendant's hands from eight to ten days prior to the dates specified for submission on a proposal. A minimum amount of time was six to eight and I was personally informed by Mr. William Laverty of the claims office of that fact. It would require two to three days to check the final plans against the preliminary plans and four or five days to get the subcontractors to reconfirm their bids."

I take it you disagree with what Mr. Payne said?

MR. SIMMONS: Your Honor, I think he stopped in the middle of that paragraph. Could we have the rest of it for continuity?

MR. MORRISON: You are entitled to read the rest of it on your redirect.

MR. SIMMONS: Well, you're questioning the witness about a statement and an affidavit, and I think

you ought to read at least the next sentence.

MR. MORRISON: I'm questioning him about the use of Mr. Payne's use of the word reconfirm. That is the subject.

THE COURT: Let counsel proceed as he feels until it is objectionable.

Q Mr. Gleason, do you disagree with Mr. Payne's testimony regarding reconfirming the prices?

A I disagree to the extent that you're not taking into consideration nor have you taken into consideration --

THE COURT: He's asked you whether you agree, yes or no?

THE WITNESS: I disagree.

Q Now you mentioned about getting bulk or unit prices, I think, on concrete and so forth. That can be done, I think you said, any time.

A That's correct.

MR. MORRISON: Would you mark this, please? This is 32 and 33 for identification?

THE COURT: One page document, Tri-County Concrete Corporation dated April 2, 1973, marked for identification as Plaintiff's Exhibit 32.

One page document dated April 3, 1973, from

the Van Neward Smith Concrete Company marked for identification as Plaintiff's Exhibit 33.

(So marked.)

Q Mr. Gleason, I show you Plaintiff's Exhibit 32 and 33 for identification and ask you if these appear to be prices from the subcontractors with regard to concrete for this job?

A These are not quotations from subcontractors. These are quotations from suppliers. That is correct.

Q Thank you.

A They would have no bearing on the placement of it. This is merely a quotation of the cost of 2,500 pound concrete and 3,000 pound concrete on April 3, 1973. This one is from the Tri-County Concrete Corporation. It is likewise a quotation for the cost of 2,500 pounds, 3,500 pound concrete effective on April 2, 1973.

MR. MORRISON: I offer these into evidence.

MR. SIMMONS: No objection, your Honor.

THE COURT: Mark them.

THE CLERK: Documents marked for identification as Plaintiff's Exhibits 32 and 33, now received in evidence.

(So marked.)

Q Now I believe you testified yesterday that you

decided to call off the work on this project late in the afternoon, two days before the bid deadline; is that correct?

A That's correct.

Q That would be the afternoon of April 4th?

A That's correct.

Q And did you call Mr. Bill Halt and you told him to come home?

A Not on that particular afternoon.

Q That's when you made the decision?

A That is when I made the decision, yes.

Q Would I be correct to say the decision had been made on April 2nd?

A Absolutely not.

Q If anybody said the decision was made on April 2nd would that be correct?

A That would not.

Q Mr. Gleason, I read you an answer to an interrogatory which is filed by the defendant in this action, National Homes Construction Corporation. The interrogatory is sworn to by the Vice President, Mr. James Wallery and was served on me by Mr. Simmons. The interrogatory is as follows, Interrogatory No. 3:

"State whether a deliberate decision was made by the defendant, its officers, employees, not to

submit a bid on the Charleston project which is the subject of the litigation.

"Answer: Yes.

"Question: If the answer -- to No. 3 is affirmative, state the date on which such a decision was made.

"Answer: On or about April 2, 1973."

MR. MORRISON: Your Honor, I would request that the jury be instructed of the effect of interrogatories, that they are admissions of a party and can be considered as such?

THE COURT: Yes. It becomes evidence when read into the record.

Q Now you testified yesterday that on April 2nd you had spoken with Mr. Voorneveld about Wiedersum's fee?

A That's correct.

Q And you passed the time of day and exchanged pleasantries?

A That's right.

Q And did you also, you had tried to talk to Mr. Voorneveld down on a fee?

A In a joking manner. I don't think there's ever a fee or quotations ever come into my office, I mean I wouldn't be doing my job if I didn't try to negotiate.

Q But you didn't tell him that National would not accept that fee?

A I think I definitely did not say they would not accept the fee. Absolutely not.

Q And did you discuss anything with Mr. Voorneveld during that conversation about the final listing of the bid?

A Negative.

Q Did you tell him that -- that you were still trying to put these things together?

A I don't think we even discussed the fact or we're not trying to put the thing together. We were still trying to put it together.

Q You didn't mention any problems to Voorneveld?

A No, sir. Because I had not been talking about specific problems on the South Carolina job.

THE COURT: He asked you whether you discussed it. Not the reason.

THE WITNESS: I'm sorry, your Honor.

Q The answer is not?

A I did not discuss any specific problem.

Q Now, I believe you also testified yesterday that at the time of this telephone call you were sitting

there at your desk or table or whatever you were, with these plans that are dated March 30th, Plaintiff's Exhibit 11. You were looking at them during thiscall, is that correct?

A I did not testify I was looking at them at that time.

Q But you had them in front of you?

A The plans were on my plan table in my office.

Q And those plans are the ones dated March 30th?

A Those are the ones that are dated March 30th.

Q Okay, there is no question that those plans were in National's office on that date?

A Those plans were on my desk at that time.

Q Do you recall what day of the week April 2nd is?

A Pardon?

Q Do you recall what day of the week April 2nd was?

A Friday being the 6th I would imagine the 2nd would have to be on a Monday.

Q I'll agree with you on that.

Now, do you know whether or not those plans came in prior to April 2nd?

A I know this, that I had not seen them prior to April 2nd.

Q You --

A May I correct that?

Q Sure.

A I had not seen them prior to Monday.

Q Prior to Monday?

A Yes.

Q Whether or not they came in previous to Friday on the 30th you have no knowledge?

A I have no way of knowing.

Q Then I take it if anybody said that these plans had not been received by April 2nd, that would also be untrue?

A Pardon?

Q I take it, Mr. Gleason, if anyone said that these March 30th plans had not been received by National Homes by April 2nd, that would be untrue?

A I think if anyone said the plans had not definitely been received by them he would be correct.

Q No, I say, please listen to my question. If anyone said that National Homes had not received these plans by April 2nd, that would not be true?

A If anyone said National Homes had not received that that would be untrue.

Q Mr. Gleason, I read to you from an affidavit

by Mr. Simmons, the defense counsel in this case, which was presented to the Court, and this is as follows: I won't read the whole thing.

"Harry Simmons being duly sworn says I am an attorney associated with the firm of Milbank, Tweed and Halsey, attorneys for the defendant. I have knowledge of the facts herein as stated and I make this affidavit," and it goes on from there.

Now I turn now to paragraph 8 of this affidavit and I read as follows:

Mr. Simmons has referred to an affidavit by Mr. Payne which I previously read to him.

"As is clear from the Payne affidavit the defendant at no time promised or represented to the Plaintiff that they would submit a proposal for the South Carolina project. The Payne affidavit further states that Defendant had informed Plaintiff that the final plans for the South Carolina project had to be received by the defendant at least six to eight days prior to the submission of April 6, 1973. When the plans had not arrived on April 2nd, 1973, the decision was made not to submit a proposal because the defendant did not have sufficient time to do the necessary work prior to the submission."

That statement is untrue, is it not, Mr. Gleason?

A That statement would appear to be untrue.

Q Mr. Gleason, you said yesterday at the beginning of my cross-examination that you changed your mind about testifying in this case because the attorneys took the deposition of National Homes officers and employees had defamed you?

A Pardon?

Q Did you not say yesterday in response to my question that the reason you changed your mind about testifying here is because you were advised by Mr. Simmons, by the attorney for the defendant, who took the deposition, had somehow defamed or cast a doubt on your reputation?

MR. SIMMONS: Objection. He didn't say any such thing as to that.

THE COURT: He wants to find out. He is asking.

A I would not state that is my only reason for --

Q You did state that as one of the reasons?

A I said I was upset over the fact there was a possibility of that.

Q Now, you didn't say possible yesterday.

A Pardon?

Q You didn't use the word possible?

A Possibly I didn't.

Q Possibly you said possibly.

Do you not recall stating that when Mr. Simmons called you last Friday he talked you into coming here and one of the reasons was because of certain alleged defamatory statements made by him during the deposition?

A Most likely, yes.

Q Now, Mr. Gleason, I show you the deposition of Mr. Walery, Mr. Payne and Mr. Duley. I will represent these are the only ones that were taken, that were taken by me. I would like you to tell me what in there you feel is defamatory of your character.

Perhaps I can save you some time. I believe the only reference to your name is in Mr. Payne's affidavit. That is at page 17 to 22.

A That's the one I'm on.

The implication of this, if this were to fall into the hands of somebody involved in the construction business, it implies I was dismissed for incompetency or like grounds. That is not the case.

Q What does it imply --

A The entire tone of the questionings, of the questions that were asked and the objections that were raised. In fact, Mr. Simmons objected here two or three times on this

for this matter even being questioned.

Q Which questions?

A Those are the questions.

Q Tell us which questions.

A In the question, "And what are the reasons that you heard as to why he was dismissed? The reasons that you heard, etc."

Q What page is that on, Mr. Gleason?

A That is on page 19.

Q That is not the beginning of this exchange?

A Pardon?

Q That is not the beginning of the discussion?

A No. As I say, it starts out here in 17.

Q Why don't you read to the jury the questions that begin on page 17?

A You want me to start here?

Q 54, start with 54.

A Mr. Gleason is no longer with National Homes, that's correct, no, he's not.

Q Excuse me, it would be better if you say question and answer. This way we would know.

MR. SIMMONS: Your Honor, the record should show this is Mr. Payne's deposition. I'm not sure that's clear.

MR. MORRISON: Certainly.

A Excuse me. The answer is, "I cannot truthfully say because I do not know.

"Question: Do you know the circumstances under which he has left?

"Answer: Only what I've been told.

"Question: What have you been told?

"MR. SIMMONS: Aren't we getting a little far afield here? What is the relevancy?

"MR. MORRISON: We would like to know the circumstances under which Mr. Gleason left National Homes.

"MR. SIMMONS: I am making an objection. I want to know. I want to know what the circumstances of Mr. Gleason leaving National Homes has to do with the issue involved in the lawsuit.

"MR. MORRISON: If he left because of being involved with the lawsuit it would have relevancy.

"MR. SIMMONS: If you want to ask a question so we can establish whether or not there is relevancy I have no objection. But I do object to the questions that you have asked.

"MR. MORRISON: I can -- I can't find out if it is relevant to this litigation until he tells me what

the reasons are.

"(An off-the-record discussion.)

"Question: Do you know the circumstances under which Mr. Gleason left National Homes?

"Answer: Only hearsay. I have no direct knowledge.

"Question: I understand that. What have you been told or heard about his leaving?

"MR. SIMMONS: I'll let him answer that question.

"Answer: That he was dismissed.

"Question: And what are the reasons that you have heard as to why he was dismissed?

"Answer: The reasons, and I heard this, and I would like to make that a point, I heard and it is hearsay.

"Question: I understand.

"Answer: That it was due to --

"MR. SIMMONS: I am going to object," and he is interrupted by Mr. Morrison, "Wait a minute, let the witness answer the question.

"MR. SIMMONS: No. I am objecting. If you want to make an attempt to establish whether Mr. Gleason's leaving had anything to do whatsoever with this lawsuit you may do so. I'm objecting to the question that you

have just asked.

"MR. MORRISON: I am not going to ask that because that calls for this witness to give his opinion as to whether the reasons he left relate to the lawsuit."

Again, there was an off-the-record discussion and then, Mr. Simmons: "There is a question open, I believe.

"MR. MORRISON: Read the question.

"(the reporter read the question)" and the person answered:

"Answer: I would like to mention again that it is hearsay. That he was dismissed because of reasons that his immediate superiors no longer agreed and go along the way that he had administered the duties of his office.

"Question: Due to those reasons, did they include the way he administered his duties with respect to the South Carolina project?

"Answer: That was not mentioned.

"Question: From what did you hear -- from whom did you hear this hearsay that you have been relating?

"Answer: I was advised by Mr. Gleason. Gleason first, then the President of the construction Bid --

"Question: Who was that --

"Answer: John Conley, that he had been dismissed and was no longer an employee of National Homes.

"Question: Was Mr. Conley Gleason's supervisor?

"Answer: Right.

"Question: And is he the one that so far as you know didn't like the way Mr. Gleason was administering --

"Answer: I didn't say it. I didn't say that. I said supervisors which could mean anybody from Mr. Conley forward."

Q Read the next couple.

A "Question: I'm sorry, I thought you said that his supervisor -- what did Mr. Gleason tell you about his leaving?

"Answer: Very short. I have been fired.

"Question: What did you say?

"Answer: What did I say?

"Question: Yes?

"Answer: I can't recall, other than the fact I -- I don't recall any comment I did make. "

Q Okay, now I ask you again, Mr. Gleason, is there anything in those questions which defames your character and reputation?

A In the construction business at any time that an executive is dismissed or leaves a company it becomes a matter

of importance if to nobody else, the executive himself. Very frankly, I'm very touchy about that.

Q But it was the answers that gave that information, right?

A Correct.

Q Nothing in my questions in any way impugned your character?

A I'll apologize. If the entire matter led you to believe I had any bones to pick with you personally, I do not have. I was upset over the fact that the implication was there.

MR. MORRISON: Your witness, Mr. Simmons.

REDIRECT EXAMINATION

BY MR. SIMMONS:

Q Now Mr. Gleason, do you recall any conversation that I had with you in which I suggested that Mr. Morrison impugned your integrity or defamed you?

A No, sir.

Q What do you recall my saying?

A There were certain portions of the -- of the depositions that as well as others it was read to me in which you stated my testimony was needed. Having been involved with it and very frankly I picked the portions that offended me and it upset me.

Q Have you seen the depositions?

A I had not seen the depositions until I came into this courtroom and I heard it. I mean I heard the existence of the depositions read in your office.

Q You read them in our office?

A After I had been to court here, yes.

Q So you had seen the testimony before you were questioned by Mr. Morrison yesterday?

A Yes.

Q Do you recall at any time in our conversations whether I suggested that the question of why you had left National Homes had been involved in this lawsuit had come up?

A Not as a specific question, no, other than the fact I had -- had certain, as I told you earlier, you had read me certain portions and I didn't very frankly know who had made the deposition.

Q Do you recall me reading a deposition or do you recall me reading from something else?

A I could not say it was a deposition you were reading from.

Q Would it refresh your recollection if I were to mention an affidavit that had been made by Mr. Voorneveld?

A As I say, I don't know what it would be read from. I do know there was an affidavit and there was information

read to me of statements that had been made by Mr. Voorneveld.

Q Do you recall whether the information that I read to you related simply to Mr. Voorneveld, did it relate to other things or was it simply to a meeting with Mr. Voorneveld?

A I think on one call the information you gave me was from Mr. Voorneveld.

Q Do you recall me ever reading from an affidavit or rather from a deposition having to do with the reasons for your leaving National?

A It would certainly at one time or another be stated or read. I would not be aware of it. It would not have been part of my decision to come up here.

Q Now, Mr. Gleason, when did you leave National?

A In the latter part of August, 1973.

Q And when was the submission date again for the South Carolina project?

A On April 6th.

Q And did the reasons for your leaving have anything to do with this lawsuit?

A Absolutely none.

Q And what were the reasons for your leaving?

A On or about the 1st of August there was a complete changeover of the corporate and parent corporation

offices. The Chairman of the Board, President, etc. The policy of the new president was extremely conservative and was going to have a great deal of effect on National Homes Construction Corporation. Very frankly, because of my age I was concerned because the contract division and the construction program in a whole was -- let me rephrase it.

The entire construction program, the scope of it and the magnitude of it was going to be reduced considerably and as a result of this new Chairman of the Board and myself, we had a very heated discussion. Not one, but two or three. I disagreed with the policy of it. I disagreed with the feasibility of it. I disagreed with the fact that we were cutting out a very lucrative end of the corporation as a whole. And, it then became, as I say, extremely heated. And, the Chairman of the Board had made a decision that one of us had to go and therefore I was the one that went.

Q He wasn't going to be it?

A That's right.

Q Did you part with hard feelings?

A As far as National Homes itself was concerned I did not part with hard feelings with National. I did part with extremely hard feelings with the new Chairman of the Board.

Q Now, did there come a time after you had left National when a lawyer contacted you with respect to testifying,

I believe, for National in another lawsuit?

A Yes. I was contacted by an attorney from Chicago.

Q That's an attorney for National?

A Yes. An attorney that was representing a lawsuit in Chicago.

Q And did you agree to testify?

A I disagreed. I would not testify.

Q Did you tell the attorney that under no circumstances would you testify for National?

MR. MORRISON: That is leading.

THE WITNESS: I did.

THE COURT: That is a leading question, counsel

Q What did you tell the attorney for National?

A The attorney called me and very shortly after I left National and I was still extremely bitter against the Chairman of the Board. And he asked me if I would testify in this matter and I said, "Under no circumstances would I testify in any matter relating to that."

Q Has there been any communications between you and the other representatives, officers of National since that conversation and my first conversation with you?

A Since that conversation and this conversation I have talked to absolutely no one. I left Lafayette, Indiana

the home of National Homes Corporation and I moved to St. Petersburg, Florida. I'm extremely happy down there and I had talked to absolutely no one untilI walked into your office on Sunday afternoon and three gentlemen, Mr. Duley, Mr. Payne and Mr. Bocca were in the office. That was the first and only time that I had spoken to anyone from National Homes since approximately October when I left Lafayette. That is October of 1973, that's it.

Q When I called you and asked you to testify in this lawsuit or raised a subject with you, what did you say in our first conversation?

A The very first time you called you told me basically the same thing. Mr. Morrison, when he called I was not interested in becoming involved and I would not become involved in it.

Q Do you recall me reading any of this, of this statement to you?

Your Honor, I am reading from an affidavit of Mr. Albert Voorneveld, November 14, '75. It was submitted to this Court in connection with a motion.

"Albert H. Voorneveld, being duly sworn herein deposes and says," skipping, "On February 26, 1973, approximately one week after a proposal conference I met with John Gleason of National Homes at our office

in Valley Stream, Long Island.

"Mr. Gleason and I discussed the plans and specifications which the Navy had issued for this project and the developments and the observations made by National at the pre-proposal conferences, both Mr. Gleason and I were optimistic about our chances of being successful bidder on this project. This optimism was due in fact to our proposal had come in second on the recent Warminster project when we had recently engaged in discussion with the Naval authorities and with National Homes regarding steps to be taken to have further proposals. At this meeting, Mr. Gleason and as I agreed, we would proceed with the preparations and submission of a bid on the South Carolina project. In fact, when the meeting ended, Mr. Gleason said in substance, "Let's go get this one."

Was that part of what I read to you on the phone?

A That's correct.

Q Do you recognize that now?

A That's right.

Q Do you recall me asking you in that conversation whether you did in fact agree to go through and put in a proposal at that meeting?

A I did.

MR. MORRISON: This is Mr. Simmons' own witness.

MR. SIMMONS: I'm asking whether you recall whether I asked him a question in a conversation. Either he does or doesn't know. I don't think that is leading.

THE WITNESS: That I do --

Q You do recall me asking you that?

A Yes.

Q And what answer did you give?

A I said that there was no way it could --

Q Excuse me?

A There's no way I agree to anything like that.

Q Agree to anything like that?

A Make an agreement to submit a proposal, a bid.

Q On the 26th, is that right?

A Right.

Q And was it then that I asked you to come to New York?

A That was the -- one of the times that you had asked me.

Q I asked you a number of times, did I not?

A You certainly did.

Q Did you agree the first time I asked?

A I did not.

Q Did you agree the second time?

A I did not.

Q I spoke to you a number of times, didn't I?

A That's correct.

Q Do you recall how many?

A No. My secretary has the log.

Q But it was a number of times?

A It certainly was.

Q And finally , you did agree to come?

A By your perseverance you wore me down.

Q Now Mr. Morrison asked when the decision had been made. Mr. Morrison asked when is a decision made on whether you put in a bid on a project.

Do you recall that?

A Yes.

Q And do you recall an answer, something to the effect of two days. What do you mean by that, will you explain?

A Corporate policy, corporate policy was that a bid, any bid that was going in must be finalized. So, that there was one full workin- day between the finalization of the bid and the bid submittal.

Q Now, why would the decision be made so late in the game, two days before?

A In this case, as in many cases, the final figures

for all of the facets of a contract were brought to me. They were assembled. They were discussed in detail and then we came to what is known as the direct construction cost which would be the cost of the site developments, the structures. The direct construction cost that would go into a job. On this bottom line figure I would then put the corporate overhead and the profit picture.

Q I understand, but why so late?

A Because the cost would not be even submitted to my office for being assembled until the night before late. So, that we would take the advantage of the greatest amount of time to get the very best prices. That every time we went after a bid it would cost us money to bid these jobs. We wanted to make as hard and as accurate bid as we could, we could go after. So, when I did submit a bid it would not be an exercise.

Q If it weren't then for the problem of pricing, a decision could be made earlier; is that it?

A You mean if we had made a decision merely to put in a bid, regardless of cost?

Q Well, yes. If such a decision had been made, such a decision could have been --

A Securing a bid, which National did not and would not do. It is not uncommon in the construction industry to put in a security bid. A security bid is one that you take the

money allocated --

MR. MORRISON: This is not responsive.

THE COURT: I think we're getting way beyond the issues here.

MR. SIMMONS: Mr. Morrison had asked about the decision being made two days prior to the bidding going in. What I am trying to get at is are there any reasons other than the problems with pricing that require a decision or indicate a decision this late.

A Certainly. There could have been labor problems. There could have been labor problems that developed into the area that make it absolutely unfeasible and impossible to go into it. Such as a labor strike or labor raises, etc., and I explained --

MR. MORRISON: Your Honor, I object and move to strike the part about any hypothetical problems that might have occurred. He just said there may be a problem that can occur. That is not relevant in talking about this case.

THE COURT: I don't see that is relevant, counselor. I think we're getting beyond the issues here.

MR. SIMMONS: Your Honor, Mr. Morrison had asked when was --

THE COURT: That's the point. I now ruled on it.

Any objection?

MR. SIMMONS: I apologize.

Q Now, Mr. Morrison read from Mr. Payne's deposition, a portion for you. Referring to going after a bid. Have you heard that term used before today, going after a bid?

A As I have stated, it has always been a favorite expression or been a habit of mine to say, "Let's go get it."

Q But not let's go do it, let's go after a bid? Have you used that expression or heard it used in connection with your job?

A In other words, when we go after a bid we go after it. We don't go into it, put in a security bid, we go after that bid to get it and make money.

Q Well, whenever you have used that expression or heard it or whenever you have used that expression, did you mean that you were going to put a proposal --

A I did not.

MR. MORRISON: Objection to that, your Honor.

THE COURT: Sustained.

Q Now, Mr. Morrison asked about a number of days that would be available for you to do the work that was necessary. I believe you made reference to thirty or forty days in your testimony; is that right?

A Pardon me?

Q I believe Mr. Morrison asked you about the number of days that would be available in connection with the turn-key project of this sort. I think you referred to 30 or 40 days.

A You mean from the time we heard about it until completion of it?

Q Did you use that number of days in an answer?

A I think I used the term 45 was not unusual.

Q 45 days fromwhen to when?

A The time we attend the pre-proposal conference until we submit a bid.

Q You said that is not unusual?

A That's correct.

Q That is plenty of time --

MR. MORRISON: Oh --

THE WITNESS: I think it is --

THE COURT: I think you're reconsidering the same thing.

MR. SIMMONS: Okay, your Honor.

THE COURT: That's what he considers the time.

MR. SIMMONS: Your Honor, I want to --

THE COURT: Go ahead. I will rule before we have too much discussion.

Q Now with National --

MR. SIMMONS: I'll withdraw that.

Q Now you testified about unit pricing in reference to one or two of Mr. Morrison's questions: If you have a unit price, is that all you need in order -- with respect to that particular material or that particular contract?

A No, sir. As I explained, National Home bids out all portions of the work other than that they are required to do by the terms of the criteria. They bid it out to subcontractors and the labor and material bid, on that basis. We need the unit prices because to establish, No. 1, we establish feasibility of the contract or estimate when it comes down to the final figure and we're getting down to the stage of finalizing a figure. We have extended out -- the unit prices so that when subcontract bids do come in this is what you call an estimate. Because you can't go out and know that you're getting the best figure in the area until you have a goal or a target to shoot to. You can't send a man out blind in a strange area and ask him to get a concrete price without knowing what that should cost you.

Q Well, what would have to show a contractor in order to get a firm bid?

A We would have to show him complete plans just exactly the way they were going to be bid or built.

Q Now who was it at National that made the final

decision in a bid as to whether a bid would go in?

A I made the final decision as to the cost. As to the overhead that would be required to run the job. I would assemble all of that. Then I would submit, not necessarily submit, I withdraw that. I would call the President. There were times when I would call Mr. Dave Price who was at the time President of National Homes Construction Corp. Asked him what profit factor you want to put on the job or as President, what profit factors were to be applied to the job. He would give me the profit factor.

I would give him the total amount of the job and he would say, "Fine, let's do it or leave it alone."

Then the next morning I would turn over to the contracting department the final bid figures. They in turn would then go and get the bid bond. And that was the reason for having to do it within one workday within the finalization of the bid and the submission of the bid.

Q You didn't make the decision on your own by yourself --

THE COURT: He said he didn't. He talked to somebody else. You're repeating these things.

MR. SIMMONS: Could I see Exhibit 32 and 33?

THE CLERK: They're on top over here.

MR. SIMMONS: I see. I'm sorry.

Q Now I show you Exhibit 32 and 33.

Who obtained those quotes?

A On this particular job, Mike Bocca.

Q And do you know the circumstances under which Mr. Bocca obtained those quotes?

A He was in the area for -- excuse me. The specific job of securing prices.

Q When was he in the area?

A He was in the area the week prior to the bid.

Q Do you know the approximate date?

A I personally told Mike Bocca on the Friday afternoon prior to that to be in South Carolina, in the area Monday morning, prepared to get final cost down there.

Q And were those exhibits, those letters that you have in front of you obtained at that time in South Carolina?

A These were obtained on the 2nd and 3rd of April.

Q Now the plans, Mr. Gleason, that you said were on your desk and on your rack or whatever it was?

A Yes.

Q On the 2nd. How did they get there? Do you know?

A Yes, I know exactly how they got there. The secretary that opened the mail for our division or our department distributes the mail and anything pertaining to a bid or the preparation of a bid, such as plans, final plans, and it

would be put on my desk automatically by her. One copy of them.

Q Now you referred to in connection with the preliminary plans, you stated that the preliminary plans, the room dimensions were on them. You then testified in response to one of Mr. Morrison's questions that you actually inspected the preliminary plans; is that correct?

A That's correct. I would have no reason to.

Q How did you know that the preliminary plans did or did not have room dimensions on them?

A Only the fact that I had been working with plans long enough, as I say, for thirty years, that I can glance at a set of plans and pretty well determine what is on it at a glance.

Q Well, did you do that in this case?

A Yes.

Q Did there ever come a point, Mr. Gleason, in which you informed Wiedersum whether or not a bid would be going in on this job?

A Just prior to the 4th, Mr. Laverty was called in.

MR. MORRISON: Just a minute. Objection. This is totally outside the scope of cross-examinatio He should have brought this out on the direct

examination. I did not bring it out on cross-examination.

THE COURT: I would think so.

MR. SIMMONS: May I have a moment, your Honor?

THE COURT: There are limitations on redirect, counselor. I think you are going beyond the situation here.

MR. SIMMONS: May I have a moment, your Honor?

(Short pause)

Q Now Mr. Gleason, Mr. Morrison read interrogatory and a response to you. Do you know what that interrogatory is?

A Yes.

Q Mr. Morrison's question related to three and four, is that right? Did you supply any of the information connected in that interrogatory?

MR. MORRISON: I object, your Honor. He is impeaching his own witness. He put in this interrogatory and I merely asked the witness was it a —

THE COURT: I will sustain the objection.

MR. SIMMONS: No further questions.

THE COURT: Is that all of this witness?

MR. MORRISON: May I just have a minute for recross?

THE COURT: Go ahead.

RECROSS-EXAMINATION

BY MR. MORRISON:

Q Regarding Mr. Voorneveld's affidavit, there wasn't anything in that affidavit that was defammatory or aspersionary on your character?

A None whatsoever.

Q You only disagree with the affidavit of Mr. Voorneveld's statement that you and he agreed on the 26th of February?

A That's correct.

Q Everything else in the affidavit was in accordance with your recollection?

A Right.

Q Now I believe you testified yesterday that when you sent Mr. Bocca the bid did he not have the plans with him?

A He did not have your final plans.

Q Now Plaintiff's Exhibit 32 and 33, these are firm price quotations?

A Negative. As I said, those are quotations from a supplier. They have nothing to do with the installation.

Q They are firm bids from supplier quotations?

A They are quotations for cost of concrete at a given time. There is nothing in there that says they will go

through the completion of the job. These are price quotations from various suppliers.

Q Those suppliers didn't need to look at final plans in order to give those prices?

A In this particular instance we obtained a price on the concrete we were going to use and how we were going to use it.

Q Now regarding the plans which you had on your desk, that being April 2nd, you referred to your secretary who opens the mail.

Did your secretary tell you when she gave you those plans that they had just come in the mail that day?

A Negative. We had a procedure whereby the plans were put on my plan table. Mail, memos or copies of letters pertaining to a job were put into my incoming file. One of your exhibits here indicates by our method that I had seen that, even though it was a letter to somebody else. It pertained to a job. It was put in my file in the incoming file. I would initial it and she would file it.

Q And you don't know how they physically got to National Homes?

A I do know this: The plans were picked up at Indiana because of your exhibit, your shipping ticket. They were picked up in Indianapolis at the airport. They were

carried by person to our mailroom. Our mailroom, in turn, distributed them to the division. The girl, the girl was responsible for the incoming mail and the incoming package and she in turn would then distribute them to the offices. As indicated by Mr. Duley, he was involved in the documents pertaining to the bids. She would put those on his desk. She would put a set of plans on my desk because the plans have to go to the estimating department.

Q These plans, the March 30th plans, it is your testimony they were picked up by National Homes at the airport in Indianapolis?

A I said picked up by a person.

Q By a person?

A That's correct.

THE COURT: He's already testified to that.

MR. MORRISON: I have no further questions.

MR. SIMMONS: Redirect?

THE COURT: Yes.

(continued next page)

REDIRECT EXAMINATION

BY MR. SIMMONS:

Q Mr. Gleason, the quotations stated in those letters, what is the amount of concrete involved there?

A There is absolutely no quantity whatsoever. No quantity. This quotation here makes no reference whether we use one yard of concrete or whether we use a thousand yards of concrete.

Q Is that letter a firm commitment to sell concrete at that price?

A This is the letter of submittal of no kind. This letter is merely an advisal to whoever asks for it. In this particular case it was on April 2nd, Tri-County Concrete Corporation would sell 2500 lb. concrete, five bag mix for $20 a yard.

Q You say 2500 lb. mix --

A Concrete, that is the P.S.I., pounds per square inch.

Q 2500 does not refer to the quantity?

A Quantity, absolutely not. Thatis as I say, it is a classification of concrete.

Q And how would you determine the quantity?

A Your quantity would have to be made by a take-off of the final plans of what was going to be required to do

the job. Your curbs and gutters, your catch basins, your foundations, your sidewalks. Whatever required concrete.

MR. SIMMONS: No further questions.

THE COURT: Is that all of this witness?

MR. MORRISON: Yes.

THE COURT: You may step down.

MR. SIMMONS: The defendant Michael Bolka.

M I C H A E L B O L K A , called as a witness, having been first duly sworn on behalf of the Defendant, testified as follows:

THE CLERK: State your full name.

THE WITNESS: Michael Bolka.

THE CLERK: Spell your last name.

THE WITNESS: B-o-l-k-a.

THE CLERK: Home address.

THE WITNESS: 67-42 Browns Mill, Lake Road, Georgia.

DIRECT EXAMINATION

BY MR. SIMMONS:

Q Mr. Bolka, by whom are you employed?

A Right now I am employed by Georgia Residential Building, building houses outside of Atlanta, Georgia.

Q Was there a time when you were employed by National Homes Construction?

A I was employed in July, 1969, up and through March of this year. End of March of this year, '75.

Q Now what is your education since high school, Mr. Bolka?

A I work through Purdue University. My major in school was management and economics. I have a Bachelor degree --

Q What were your duties at National?

A I started out as a department coordinator in the division, as an estimator. That is the commercial division, school division, which Mr. Wiedersum has made reference to.

Q I'm sorry, what's that?

A The school relocatable division.

I coordinated jobs throughout the country for National. We had projects going in twenty-six different states. I trouble-shooted, coordinated field problems, cost, special things of this sort. Then I did a turnkey project, commercial. I worked for Mr. Linstrom. I did have a variety of things to do. I traveled extensively and then after that spent quite a bit of time in the field working on projects. After that I was employed as an estimator for Mr. Payne. Spent some time with Mr. Payne, and after that I went to Atlanta to do projects. That was 590 apartments for the Atlanta Housing Authority.

Q Between January and April, 1973, what were you doing for National?

A Between what?

Q January and April of 1973.

A I was an estimator.

Q Did there come a time, Mr. Bolka, when you heard about the South Carolina project?

A The military project?

Q Yes. What we've been referring to as the South Carolina project, the Navy.

A I've heard of that project.

Q When did you first hear about it?

A Specifically?

Q As best you can recall.

A Well, I heard mention of it probably, the conversation with Mr. Payne whenhe was in the meeting in February. Some time when he was in a meeting out at Wiedersum's in New York or some place. But it would have only been in direct conversation. This type of thing I had been given -- there was nothing for me to work on. I just heard the name, that was it.

Q Did there come a time when you were assigned some duties with respect to the South Carolina project?

A Actually -- well, I started becoming very deeply

involved with the Charleston job in mid-March. Some place in there, to the best of my recollection.

Q Well, how did you become involved? What did you do?

A Well, Mr. Payne, some time in that time had -- in the early part of March, I would guess it would be around the middle part I had brought some preliminary plans back from New York, for me to start working on. I started reading the criteria and other information that we had at that time.

Q After you familized yourself with the project, the plans, were you assigned any duties, given any tasks?

A My responsibility in the project itself would be tie down firm commitments from subcontractors.

Q And what did you do? How did you go about this?

A Well, I made a number of calls to Charleston. We had a Watts line to steel contractors, and I had telephone conversations and saying I was coming in the area. When we got there I would hope to review our plans, review the bidding price and details of the plans and project, and try to come up with firm fixed prices on labor and material.

Q Do you recall conversations about the final plans?

A Yes.

Q When did you start to call edersum?

A It would be mid-March, some place in there.

It was very vague. I never knew when I was going to get the plans. Just nobody knew when the plans were coming out. There was this tentative schedule. I knew I would be down there just prior to the bidding and hopefully be down at least ten days with some final plans to get down there. Now, it was not unusual in a situation of this sort to be down several weeks ahead of time with plans, work continuously to the bid date.

MR. MORRISON: I objec[illegible] responsive to the question.

THE COURT: Sustained.

Q Mr. Bolka, usually how long before the submission date would you go into the area, if you had plans?

A Three to four -- excuse me, two to three weeks. Some places I would generally go to the area and it didn't matter what type of job, we needed that minimum.

Q Well, what were you trying to obtain, sucontractor's quotes or commitments for all the subcontractors for this job or just some?

A Just some.

Q And what subcontractors were you trying to obtain commitments from?

A My prime concern on this particular job would have been the site development which would include excavation

or clearing of the area and rubbish.

Q What is clearing and dredging?

A That, you go on the site and we have heavy-duty equipment. The heavy-duty equipment knocks down grades and the site is prepared for earthwork. You have to knock down trees and get rid of the rubbish, etc.

Q Now what would be some of the other subcontractors that you would deal with?

A Excavation, buttress excavation, finishing excavation, sanitary information and the storm sewers. The sub-base for paving, paving itself. Sealing, if it was required. In this particular instance curbs and gutters. I also get bids on sidewalks, driveways, working in extensive detail on foundation and footings. Foundation and the wall slabs. This would be, you would want the labor, material with fixed quotes on these. I also wanted bids on landscaping. So as I am, you know, just general things. I wanted to concerningthe structure itself, the building itself. I was concerned with certain aspects of the building, drywall. I would need labor material quotes and prices on that. I also need to have carpentry bids.

THE COURT: This is a convenient time to take our usual ten-minute mid-morning recess at this time, ladies and gentlemen.

BEST COPY AVAILABLE

(Jury excused.)

(Short recess.)

(Whereupon, the Court resumed.)

(Jury enters box.)

BY MR. SIMMONS:

Q Had you finished describing the subcontractors?

A There were a few more things, but that's basically what I was there for.

Q You referred to site work, did you?

A Yes.

Q Very little to do with building.

A An awful lot to do with building. It's the major area.

Q The major area of what, now?

A Well, it was a major responsibility I had of getting costs and time and prices and contracts for that, that phase of the work.

Q How large is the site work of this project?

A It depends on the project.

Q This particular project?

A It's major. Just major. In this particular project they couldn't really determine that because I couldn't determine the soil -- it was a major problem with this particular project.

Q Major aspect of it. You talked about your duties. Did there come a time when you actually went to South Carolina?

A That is correct.

Q And when was that?

A On the Charleston job, it would have been, I was down there Monday morning. Monday morning of April 2nd. I was to be on the site.

Q And were you actually down there at that time?

A I went down the day before. I went down on Sunday.

Q And do you have any way of establishing that you were actually down there at that time?

A I checked my credit card calls and numbers and it certifies when I went down there.

Q And do you have that with you today?

A I don't have it with me. No, I do not.

MR. SIMMONS: May I have -- I don't know. I would have to look through the papers what I do have and what I don't.

Q Would you do that for me, please?

A I sure will.

(Witness leaves stand.)

(Witness returns to stand.

MR. SIMMONS: Could I have this marked for identification as a Defendant's Exhibit?

THE CLERK: List of telephone calls marked for identificationas Defendant's Exhibit J.

(So marked.)

Q Describe for us again what that is, Mr. Bolka.

A Well, this is a credit card issued by National Homes Telephone Company. I used it for billing long-distance calls or for some billings I used and there are certain times I would just use it.

Q Do you recognize it as being a record of the calls made by you at that time?

A Some of the calls, yes. I made a lot of calls at that time. This is some of the billing of the calls.

Q Now with that can you establish when you were in South Carolina?

A Well, I was in -- I flew into Atlanta and I was in Atlanta and I flew over to -- Sunday morning I flew over to -- Sunday sometime, I'll make it Sunday sometime I flew over to Charleston area.

MR. SIMMONS: I offer it.

MR. MORRISON: No objection.

THE CLERK: Document marked for identification as Defendant's Exhibit J, now received in evidence.

(So marked.)

Q I'm sorry, you were saying, Mr. Bolka?

A I flew in Sunday morning and I went out, I was still in Charleston on the 4th. I made a number of calls on the 4th.

Q You were in Charleston for the purpose of?

A Tying down these contracts, bids. For the contractors.

Q Now the calls you made from South Carolina, where were they made?

A Well, some were made to Lafayette, Indiana. Some were made to -- one was made to Macon, Georgia. There is a contractor there and I made a number of calls here to Valley Stream which was the Wiedersum people.

Q You made calls to Wiedersum from South Carolina?

A Yes.

Q For what purpose?

A To get information because I didn't have the plans. The plans I had were inadequate. I needed details.

Q What plans did you have?

MR. MORRISON: I object to that.

A I had some plans Mr. Payne brought there and they were site plans. They had soil borings. I know, I had a copy of the structure itself.

Q Now I show you what has been admitted into evidence as Plaintiff's Exhibit 11. These are the plans. They bear the date March 30th, and ask you to inspect them.

A There's one sheet I remember here. These are not the plans. These are not the plans I had.

Q Are you sure of that?

A I know they're not.

Q Is there a particular feature on those plans that you can point out to us as not being the plans that you have or you had?

A The plans I had were very vague. Some of the things from the building rings a bell and the other plans -- I didn't have this many plans. So you can see --

Q So you called Wiedersum's office. Can you identify that from the exhibit how many times?

A In April, let's see when I called Wiedersum's?

Q Yeah.

A Well, on April 2nd one call, two calls, three calls. I made three calls to them.

Q Do you recall who you talked with?

A Well, first off, I called Lafayette, Indiana and talked to my superiors.

I asked permission to call Wiedersum's. I had a number of questions. Then they told me they wouldn't answer

them there. They didn't have the information I needed.

So they directed me to call the Wiedersum group.

Q Well, what sort of information did you need?

A I needed things concerning the site development. There was, for example, a problem with the swamps and in this type of thing, sewers. I talked to someone, I believe it was their department head concerning the problems of landscaping and the major area, I can remember having problems with.

Q Did you make any notes of your observations while in South Carolina?

A Yes, I did. It was normal to make notes.

Q Now I show you what I am going to ask to have marked as another defendant's exhibit.

THE CLERK: Three-page document marked for identification as Defendant's Exhibit K.

(So marked.)

Q This document has been identified as Exhibit K. I ask you, Mr. Bolka, do you recognize that document?

A Sure. It is a rough draft I had one of the girls type up.

Q A rough draft?

A A summary of my field notes.

Q When you say a rough draft, did you ever finish it into a polished draft?

A No.

Q That was the end product?

A That's the end product, that's as far as it goes.

Q Your notes of what now?

A It's my notes of conversations and problems I had concerning the Charleston job.

Q Was it your normal practice to make notes when you would visit a location away from the home office and to make an inspection of this sort?

A Yes.

Q And was it the practice of National that these notes would be put into the file?

A Yes.

MR. SIMMONS: I ask that this be admitted into evidence, your Honor, as Defendant's Exhibit K.

MR. MORRISON: I have an objection which I would like to make at the bench.

(The following occurred at the side bar.)

MR. MORRISON: Your Honor, I have no objection to item 1 on this memo because that relates to soil problems which they have said is part of their reason. I object to the balance of this because it all deals with the --

THE COURT: What?

MR. MORRISON: The balance of the memo deals with the alleged deficiencies in the plan which your Honor already ruled is not in evidence.

MR. SIMMONS: He testified he did not have these plans. He is talking about the defects in the plans. We had here in Court, he's not talking about defects in Exhibit 16. He's talking about defects in Exhibit 16. He's talking about information and problems that he was having with the plans that he had. He didn't have those plans. We're not talking about the insufficiencies of Exhibit 16.

MR. MORRISON: Or Exhibit 11.

MR. SIMMONS: Or of Exhibit 11. He said he didn't have them.

THE COURT: Well, I think we ought to exclude any reference to changes in the plans. Isn't that your point?

MR. MORRISON: Yes.

MR. SIMMONS: No, your Honor. Your Honor, there is no change in the plans. He didn't have either of the sets with him. He didn't have them. He only had the preliminary plans.

MR. MORRISON: Are you going to stipulate this relates solely to the site plans that were picked up on

March 6th?

MR. SIMMONS: Yes. That was his testimony.

MR. BROOKS: That's what he said.

MR. SIMMONS: That's what he said.

MR. MORRISON: But you still haven't, you never said site plans, they were inadequate. That is not part of your claim.

MR. BROOKS: Yes.

MR. MORRISON: The only thing in the interrogatories is this part here about excavations. I have no objection to that. I have no objection to the excavation part.

MR. SIMMONS: Your Honor --

THE COURT: One at a time. I can't hear both of you.

MR. SIMMONS: Your Honor, the interrogatories relate to the actual plans that were for submission. The plans that were for the submission as alleged in the complaint are the plans that were sent out on or about April 4. What Mr. Bolka is talking about here, the problems that he was having, don't have nothing whatsoever to do with Exhibit 16 or Exhibit 11. It has to do with the efforts that the defendant in this case was making in order to put in a proposal.

Now, Mr. Morrison has stated in his opening --

THE COURT: I have your point. You don't need to develop it.

What do you say?

MR. MORRISON: Well, the problem is it's going to be hard for the jury to read this without being confused as to what is it they claim is inadequate.

MR. BROOKS: It doesn't apply to the final plans. They are the March 30th or April 4th or 5th or 6th plans. You have no objection to it.

MR. MORRISON: Will you stipulate on that on the record?

MR. SIMMONS: I don't have to stipulate it. He testified to that.

THE COURT: All right.

(The following occurred in open court.)

VOIR DIRE EXAMINATION

BY MR. MORRISON:

Q Is it your testimony, I believe, that when you were in South Carolina area on April 2nd, that you did not have the March 30th plans with you,nor did you have the April 6th plans with you; is that correct?

A Correct.

Q The only thing you had with you were the site

plans that had been brought back by Mr. Payne in March?

A Correct.

Q Is that correct?

A Correct.

Q So this memorandum you made in your discussion of those plans only relates to those preliminary site plans; is that right?

A Well, they also pertain to some conversations with the Wiedersum people.

Q But the final plans are about --

A These are about the site plans I had.

Q This memorandum has nothing at all to do with the final plans that were sent on the 30th of March and then again on the 6th?

A I don't understand that, your Honor.

Q Well, that's --

A I don't understand.

MR. SIMMONS: I think his testimony is pretty clear. He stated the plans, these are the plans he had in South Carolina.

THE COURT: We've heard the testimony. You don't have to repeat it. We know what it is.

MR. MORRISON: May I withdraw my objection and let me pursue the voir dire?

THE COURT: Let him proceed, yes.

VOIR DIRE EXAMINATION

BY MR. MORRISON (Cont.):

Q Mr. Bolka, I want to make it clear. Is it your testimony that this memorandum does not relate in any way, shape or form to the final plans which Wiedersum sent on March 30th and again on April 5th?

A That memorandum --

THE COURT: Well, the answer should be yes or no.

THE WITNESS: I can't answer it yes or no. It relates to the project, the entire project. The only thing I was looking at were the preliminary plans.

Q Is it your testimony that any discussion in the memorandum of the plans relates solely to the preliminary plans and has no bearing in any way, shape or form to the final plans that were sent on the 30th or on the 5th?

MR. SIMMONS: Your Honor --

THE COURT: Wait a minute, one at a time.

THE WITNESS: Can you qualify the question? I don't understand it. I really don't understand what you are saying. That relates to the project in South Carolina. The general project of South Carolina.

Q I understand that. Your memorandum relates to

the plans and alleged problems with the plans. What I want to know is a simple yes or no, does this memorandum relate solely to the preliminary plans and therefore does not relate to in any way, shape or form to the final plans sent on the 30th and again on the 5th. Is that your testimony?

A The heading on the memorandum, I believe it concerns the South Carolina project. It does not -- and I repeat, it relates to the project itself. Now, if it was a memo concerning plans -- I really don't know. It concerns the whole project.

MR. SIMMONS: Your Honor, may we approach the bench?

(Side bar.)

MR. SIMMONS: Your Honor, I think the problem that we have here relates to Mr. Morrison trying to get the witness to state that it contains problems that he observed of no ramifications as far as the plans were concerned.

THE COURT: He asked him that.

MR. SIMMONS: He is asking the witness to now make a --

THE COURT: I have the point. I listened to the testimony. You don't have to relate it to me.

What do you have to say?

MR. MORRISON: Based on his answer I continue my objection.

THE COURT: I sustain the objection.

MR. MORRISON: I have no objection if they want to introduce Section 1 of this memorandum.

THE COURT: Then you may remove the other pages.

(The following occurred in open court.)

THE CLERK: Document marked for identification as Defendant's Exhibit K, received in evidence as indicated.)

(So marked.)

BY MR. SIMMONS:

Q Mr. Bolka, referring only to item 1 of your memorandum and only to item 1 --

MR. MORRISON: Are you physically conforming the exhibit to the Court's ruling?

MR. SIMMONS: Shall we do that now? I thought it was deemed --

THE COURT: Physically?

MR. SIMMONS: Physically remove it, okay.

THE CLERK: Here is just the first page.

MR. MORRISON: Only Section 1 goes in.

Q Mr. Bolka, does Exhibit K relate to some of the

problems that you were having on this project?

A These notes?

Q Yes.

A They are site development problems only.

Q The note that you have in front of you relates to what problems?

A Excavation.

Q What was some of the problems with excavation?

A Well, the plans or the problems, the problems with the plans of excavation was --

Q Would you read the exhibit?

(continued next page)

A I'll read the note. "Excavation brings us to the dilemma between Wiedersum and the excavation contractors in area. Neal Hamburg of Wiedersum indicated to myself that earth would balance at approximately 2,000 cubic yards. This work would balance at approximately -- excuse me. This amount would be derived from 20 cubin yards of rough grading with a net after compaction of the effect of 16,000 cubic yards. This give us 20 percent compaction factor.

Mr. Moore of In-Land Construction and Mr. Ferguson of Colonial Construction Company indicated that from their experience on the base shows that a large percentage of excavation on the earth in on-site would not meet the 95 percent compaction requirement. If required compaction was not met, new fill would be required. New fill would 225 per truckload per cubic F.B. This means we'd have an added spread of compaction factor and a compaction cost. In addition, the plans do not indicate where swamp areas, how swamp areas are to be treated. In fact, Wiedersum's plans don't show swamps which exist on the site.

Q Now, referring to the first paragraph, you say the excavation work is a dilemma. Explain in your own words what you meant by a dilemma in that respect.

A Well, I went to what was considered, Colonial and In-Land Construction, two of the biggest excavators in

the general area. I had physically seen the site and they had done work on the base. They, and after examining the plans, explained the details, and after they examined the plans, they really weren't sure whether they could meet and come up with any type of price because of the vagueness that was on the plans I had. And in conversation with Wiedersum people they -- nobody could tell me for sure what to tell the contractors or what to show the contractors. So, I didn't have the information.

Q These were conversations with Wiedersum people from South Carolina?

A Yes.

Q Were there any other problems relating to the excavation work?

A We didn't -- we couldn't tell what grades to put in, there was nothing on the plans.

Q Excuse me?

A Grades. The depths and heights of buildings, the streets. We couldn't tell how the engineers wanted us to handle such information.

Q Well, I know you were in South Carolina from the 1st through the 4th, was it?

A Yes.

Q Can you pinpoint when you had your conversations in which you raised these specific problems with Wiedersum?

3

A Well, I started talking about the Wiedersum, I stated talking extensively on April 2nd.

Q On April 2nd?

A Yes.

Q Do you recall what problem you related as to the excavations that you discussed at that time?

A Water table and swamps.

Q What do you know about water table and swamp problems; specifically what did you discuss?

A We had soil borings. There were underground problems about the soil. Under those conditions it would be very hard to meet the criteria and specifications on compaction.

Q What do you know about water tables, the problem, what does that mean?

A It's underground water. Water would be reached beneath, how far.

Q Where would water be reached?

A According to the plans and some references in those tables, if I recall, you could hit water, there was surface water also and you couldhit it at six inches below the ground.

Q And you conveyed that information on to Wiedersum; who again did you speak with?

A Mr. Hindberger.

Q And what specifically did Mr. Hindberger say to you as best you recall?

A The best I recall, he couldn't give me answers, specific answers. He was going to review and look at what he had. He couldn't give me answers as to what to do.

Q Did he get back to you at any point while you were down there?

A Not on the problems I was asking, other problems I was talking about.

Q What were some of the other problems related to the excavation work?

A Well, we didn't know how we would -- what grade. We get back to the grade. There was some question as to the contractors, they brought it up, the grade. It wasn't clear on the plan I had, what to do about that.

Q You say contractors brought it up; it was related to the grades, what do you mean?

A Well, they examined the plans and normally the plans indicate where you're going to have swamps and where the water tables are; soil borings were made on the plans and specific areas. These plans that I had didn't indicate this. You see, you have got to achieve compaction. Compaction figures out what we're going to do. So, we can tie down the contracts.

Q You had to get compaction, what compaction?

81 A That is building up the earth as to measures of hardness.

Q Could you give us some specifics?

A You take soft dirt and you roll it, well, you undercut it or whatever you do. And you build it back up and you take equipment and you put it down in layers and you run compaction equipment, big rollers, hugh rollers on a piece of equipment and you go back and forth until the engineers tell you it's all right and you keep building it up.

Q You didn't have enough information?

A Nobody had enough information. It was not shown on the information I had.

Q Now, were there any other problems relating to the excavation work that you discussed?

A We would have to be digging a number of trenches on this type thing.

Q Trenches? Why?

A To put in storm sewers and sanitary sewers and things in. We couldn't tell from the plans I had down there. Nor could the contractors, how deep to dig the holes or ditches. That was -- that was the major thing we were concerned about.

Q Were there any other problems related to the excavation work?

6

A Well, just that the plans were so incomplete I couldn't get prices, firm prices on contracts.

Q You couldn't get this price from the sub-contractor?

A They were just so vague. My contractors just wouldn't quote.

MR. MORRISON: I object to that and move to strike.

THE COURT: Sustained.

Q Were you able to get commitments from some contractors for areas other than for excavation work?

A No. I was able to get some prices.

MR. MORRISON: I object to that and move it be stricken.

THE COURT: Sustained.

Q Now, Mr. Bolka, how significant a part of site development work is landscaping?

A Very significant.

Q How significant?

A Well, it's a major one -- one of the major categories. It is a cost category that we have to tie down.

Q Did you obtain sub-contractors for landscaping work that was required?

A I contacted and met with landscaping contractors.

Q Did you obtain the confirmation for commitments

that were needed for the sub-contractors for landscaping?

A No, I couldn't get prices. They wouldn't give me prices.

Q Excuse me?

A They would not give me prices.

Q Did you discuss any of these problems with the problem of getting sub-contractor commitments for landscaping with Wiedersum?

A Yes, I did.

Q Now, the gas distribution system, what is that?

A That's how you will get your gas to the buildings. It shows the route of the piping and where to go and how to do, what size pipe valve, connections, et cetera.

Q How did you obtain commitments or quotes from sub-contractors for the gas distribution system?

A I contacted them but they would not give me --

MR. MORRISON: I object, your Honor.

MR. SIMMONS: Your Honor, this relates to the problem of getting commitments from sub-contractors. I think Mr. Morrison has indicated that at the beginning that this is very much an issue in this case.

MR. MORRISON: Getting bids from sub-contractors and land improvement, which is why I allowed the

question on landscaping. That's exactly what his answer said.

THE COURT: Objection sustained.

Q Now, you refer to the problem of getting commitments for landscaping and for excavation work, is that right?

A Yes.

Q Did you have those commitments?

A No.

Q Did you ever get -- while you were in South Carolina, the information that you said you needed to give to your sub-contractors relating to those two areas?

A No.

Q And when did you come back, go back to Indiana from South Carolina?

A As I recall, it was late on the 4th. On the 4th. It was late, late 4th. It may have even been the 5th, morning of the 5th. I can't recall a specific date when I came back. I know it had been very late. I think -- I think it was very late on the 4th.

Q Now, you mentioned ideally trying to get into the area for some period prior to the actual submission date. I think you may have mentioned two weeks?

A Yes.

Q You went down here on the first?

A Right.

Q Why did you go so late?

A We never received the plans, the final plans to tie down what we needed.

Q Now, with respect to your subcontractors in South Carolina, were you going to show them the final plans at this point?

A Yes.

Q When did you plan to do that?

A I would have hope to start it 10 days before.

Q When you went down, you went down without final plans? Now, when did you plan to show final plans to your sub-contractors?

A There's no way I could show them final plans. The only thing I could show them when I got there was the preliminary plans.

Q Would you have to show final plans to the subcontractors in order to --

A Definitely.

Q So you did plan to show them at a point?

A I definitely planned to.

Q Now a sub-contractor sees what you tell them is a set of final plans. He gives you a commitment, a quote

based upon them?

A After he reviews them and examines them and does what is necessary, he does.

Q Well, how does he assure himself, if you know, that the plans aren't changed?

A Revisions, if there are changes, he has to look at them constantly and review the plans. If the plans have been revised he has to look at them.

Q Does he get to keep a copy of the plans?

A I'm not sure if he does or not. Sometimes yes.

Q Sometimes they ask?

A Some contractors will.

Q Some don't?

A Some don't.

Q Now, did there come a time when you were called back from South Carolina?

A Yes.

Q And by whom and when?

A I believe it was Mr. Gleason. He wanted me to go to New York. It was late. I believe it was late the 4th. Very late the 4th.

Q He called you or you called him or what?

A We had been in communication almost constantly concerning this, trying to get information. I had been having

conversations with him.

Q What was said during that conversation, that conversation in which you were called back?

A Come to Lafayette.

Q Any reason given?

A I don't question Mr. Gleason's orders.

Q You don't question him?

A No, I don't.

Q Just a moment, your Honor.

Mr. Bolka, did you obtain firm commitments from any of the sub-contractors on your trip?

A You mean the contractors that would say -- firm contracts?

Q Yes, firm commitments.

A No. I got some suppliers. But not firm contract quotes. Not really firm quotes, there were variables.

MR. SIMMONS: No further questions.

CROSS-EXAMINATION

BY MR. MORRISON:

Q Mr. Bolka, is it your testimony that you first became involved in this project after the meeting with Mr. Wiedersum around March 6th?

A No.

Q Is it not your testimony?

A It was, I think I clarified that, in the middle of March.

Q Middle of March and your first involvement was to read through the specs and the criteria?

A The criteria and look over the soil borings.

Q I see, soil borings. Did you have any preliminary plans at that time?

A Just what was supplied to Mr. Payne.

Q What did those, what information did those forms contain?

A They were the preliminary site plans of the site, site plans. A few structures, very, very vague plans.

Q But they are site plans, they are part of the final plans?

In other words, they're pages out of what would become the final plans, is that correct?

A The site -- could you repeat that, I don't understand.

Q Is it correct, is it not, that a site plan is merely a page or two pages of what eventually becomes the final plans?

A Site plans are usually, in this case, were the bulk.

Q The bulk of the final plans?

A Well, what the plans -- the plans I had there were more site than construction.

Q You had those?

A The preliminary plans.

Q And they were site plans?

A Yes. Some site plans and they were not all the site plans needed.

Q But they were enought that you could go out and start doing pricing, is that not correct?

A To start getting general prices, yes. Not firm prices.

Q Isn't it correct that you were told that your company had looked at the site plans and had approved?

A Nobody ever approved them. We looked at them and studied those plans and they were just the preliminary plans. I don't know if anybody went through them.

Q Mr. Bolka, I read to you from Plaintiff's Exhibit 10, which is a memorandum of a meeting on March 6, 1973, between Mr. Payne and various employees of Wiedersum's. It states as follows:

"The purpose of this meeting was to review schematic designs for the project, including site plan and individual house plans. The following comments were made. One, Mr. Payne generally approved our site plans and requested us

14

to combine or unite, so we can make use wherever possible."

Is it a fact that the site plans that Mr. Payne brought back from the meeting were entirely sufficient for your purposes?

A He said generally approved. He didn't say approve them. Here again, they were general.

Q Those plans were sufficient to allow you to obtain pricing, were they not?

A Not the pricing necessary to turn in a bid.

Q In the final re-confirmation?

A That's correct.

Q You could go out and start talking to people and start amassing your price information?

A I don't understand the question.

Q The question is very simple. Those site plans that were referred to in that memorandum were sufficiently detailed so you could have gone out and began work amassing the necessary details with prices?

A I could start getting general prices, that's all. Guesses, guesses, that's all. I couldn't start actually -- I couldn't start my actual assigned function of getting fixed prices.

Q You got a letter from a supplier or sub-contractor giving you a firm fixed price?

A I could get some letters concerning some prices from suppliers.

Q You could also get tentative prices for site work.

A Very vague estimates.

Q Very vague estimates?

A That's all they would be. They would not be firm prices.

Q Did you attempt to do that?

A I had conversations and I called and I started to talk to prime contractors.

Q Prior to the week of April 2nd?

A Oh, yes.

Q Did you go to South Carolina prior to April 2nd?

A No.

Q You did not?

A No. There was no need to.

Q I will now read to you from Mr. Payne's deposition.

MR. SIMMONS: What page?

MR. MORRISON: Page 57, 58.

Q "Question: In order to do these various things, the pricing, the sub-contracting and so forth, did you need to have the finished, complete plans from

Wiedersum in order to do all of that or to be working?

"Answer: To finalize the pricing?

"Question: Yes.

"Answer: Yes.

"Question: But, you could begin working pricing without having the final complete interruption?

"Answer: Preliminaries, yes.

"Question: And you did in fact start working on various aspects?

"Answer: Right. That is the purpose of going into the territory."

Do you disagree with Mr. Payne's testimony?

A To start working on pricing, I did not have to be in the area.

Q Is your testimony you were not in the area prior to the week of April 2nd?

A I had been in and out of South Carolina with general ideas constantly throughout my time at National Homes. So, I had been in and out of that area.

Q Specifically the Charleston area?

A I'd have to refer my record.

Q Did National have any other projects in South Carolina?

A We bidded on a number of jobs in South Carolina

17

and North Carolina and in that general region, that part of the United States.

Q Is the terrain in Charleston, South Carolina any different from other places in South Carolina?

A Every terrain is different on every job. You only have a general idea --

Q There are no other swampy lands anyplace except by the Naval Station in South Carolina?

A I'm not a -- I'm not a geographer. I don't know. I'm sure there is.

Q And in fact your firm knew it was all swampy land and now you --

A I can't possibly know what happens until you look at the swamp and you had studies on it.

MR. MORRISON: Will you mark this as Plaintiff's Exhibit 33 for Identification?

THE CLERK: Boring logs marked for Identification as Plaintiff's Exhibit 34.

Q Mr. Bolka, I show you Plaintiff's Exhibit 34 for Identification and ask you if you have ever seen those before.

A I believe these are the soil borings furnished by the Navy Department for the race -- they were trying to bid --

Q This is in South Carolina?

A Pardon me?

Q For the South Carolina Project?

A For the South Carolina Project. That is the soil boring preliminary.

MR. MORRISON: I offer these in evidence as Plaintiff's Exhibit 34.

THE CLERK: Document marked for Identification as Plaintiff's Exhibit 34, now received in Evidence.

Q When did you first see those boring logs, Mr. Bolka?

A I believe Mr. Payne or I would have started looking at them someplace in mid-March.

Q Mid-March?

A Approximately. It could have been sooner. I couldn't recall.

Q Do you know when they were sent to National Homes?

A I would assume they came in prior to the -- I don't know for sure. I would have to assume. I wouldn't know for sure.

Q Isn't it correct them came in on February 7th when Mr. Laverty forwarded the plans and aspects?

A Possibly, they could have probably been with

the criteria.

Q What is the function of these boring logs?

A They're probes into the earth to look for problems or what could potentially be problems to give data on it.

Q What did you do with that?

A What do they tell me?

Q Or anybody reading them with knowledge?

A Anybody that is reading a description of the problems underneath the earth, it is the sub-surface examination.

Q They are extremely detailed, are they not?

A Yes. They are relatively detailed, yes.

Q They tell you in addition the soil, the various levels below the earth?

A It points out the soil and the water tables, et cetera.

Q So you didn't need this, you didn't need to see any plans from Wiedersum to know about soil conditions?

A In general I knew that there was some swamps and bad soil conditions. Very bad soil conditions.

Q So nobody at Wiedersum told you -- had to tell you anything more about that?

A We -- they could have --

Q These are not shown --

A These are not shown on the plans, they are generally shown on the final plans, the engineer's plans. These are not shown on the plans.

Q But you had the information, did you not?

A I had this, but they are not shown, relating to what they're building. They were not shown on our plans. The Wiedersum's plan, I was trying to get the details --

Q All you had to do when you received them was to set one down beside the other at the --

A I'm not an engineer and engineers do that. I'm an estimator. That means I have to go through and do engineering.

Q Does National Home Construction employ any engineers?

A We employ, we have in-house and we're hiring outside firms. But, that work is --

Q You mentioned you really can't deal with the swamp problems until you look at the site plans, is that correct?

You've got to go out and take a look at it also?

A It's advisable.

Q The first time you did that was April 2nd?

A No. I probably -- the first time I was driving

around and I knew of the terrain on Sunday.

Q O.K.

A And I went back out there on the 2nd, very early that following morning.

Q Isn't it a fact that National Homes went out and inspected the soil in detail back in February at the pre-proposal conference?

A They walked it just as I did.

Q I read to you Mr. Bolka from Plaintiffs Exhibit 8 which is Mr. Payne's memorandum to Mr. Gleason at the pre-proposal conference.

"We visited the proposed site and it pretty well complemented the drawings we had. The site is heavily wooded, 18 acres, and minor to major swamp area. Some areas will have to be undercut and re-tilled. The drainage is a network of asphalt coated steel smooth-flow pipe. The soil condition is spongy as istypical of most of the Southeastern region near the coast."

So your office knew all about the soil conditions long before you went there on April 2nd?

A Yes.

Q Now, the question of landscaping -- by the way, was the South Carolina Project that we're talking about in this litigation, was that the only project underway at this

facility?

A No, there was another project. You mean -- excuse me?

Q At this facility, at the Naval facility?

A Was it the only project underway?

Q Yes.

A You mean was there other building going on?

Q Yes.

A Yes, certainly.

Q Was that a housing project?

A Right adjacent to it.

Q Right adjacent to it. How far along had that come in construction?

A They were pouring slag if I recall and trying to finish some of the buildings. They hadn't put any streets in.

Q That's the slabs, the foundation for the housing?

A Some of them.

Q That was going right on adjacent to the site in this facility?

A Yes. I remember because I tried to get on that site to talk to the contractors on there and I got ran off. I was almost shot. The general supervisor, he was made. I remember that, I couldn't get on to see it.

Q We wouldn't want you to get shot. Well, you said you had trouble in talking to the contractors in the area because they didn't know about the swamps on the property?

A Which contractors?

Q When you talked to them about excavation, didn't you discuss -- you just testified to --

A What I was trying to do is tie down the prices. When they look at the Wiedersum's plan, they look at it and they said these are supposed to be -- we can't possibly bid this thing and give you a price because we don't have time and we can't possibly sit down and come up with a price. They wouldn't have the time.

THE COURT: This is the usual time to recess. We will now recess, ladies and gentlemen, until 2 p.m.

(Whereupon, a luncheon recess was taken.)

100 AFTERNOON SESSION

MICHAEL BOLKA, having been previously duly sworn, resumed the stand and testified further as follows:

RECROSS-EXAMINATION

BY MORRISON:

Q Mr. Bolka, you mentioned on your direct examination something about a compaction problem at the site.

Now, what was the nature of that problem?

A Well, according to this information, there were water table problems, silt problems, etc.; that was the type of material that we had to work with on the site.

Q What is your understanding of compaction to mean?

A Compaction, well, in excavating you have a cutting and balancing of land, and where you are raising the land itself, the amount, it is a measurement as to the hardness of the dirt that you are raising or the grade that you are raising, so you have a unit measurement of hardness.

Q Is it hardness or density?

A Density -- I am not sure. I am not an engineer. It is a long time since I have worked with this.

Q Is this measured in a number or a figure?

A Yes, it is different numbers for different areas.

Q Who sets the applicable number?

A That is identified by the plans.

Q By the architect's plans?

A By, well, it is in the criteria, what that would be.

Q Thatis what the Navy puts out?

A I believe so.

Q I show you Defendant's Exhibit D which has previously been identified as the Navy specifications for this project.

A The specifics or the criteria?

Q You want to call them criteria?

A No.

Q I direct your attention to 2(a)(5) under compaction requirements, and I ask you if that tells you the appropriate compaction requirement for the project.

A Under what section, sir?

Q It is right on that page, on the top.

A You are asking me what?

Q Does that not show you what the proper compaction requirement is for that project?

A Yes, it tells us what compaction they need for certain areas.

Q And expresses it in a percentage, right?

A Yes, it does.

3

Q Ninety-five per cent?

A Yes -- well, it expresses it in some areas for 95, some 90, I don't know -- if this is modified I don't know. If it is modified or just standard.

Q But that is not something that the architect determines, the compaction?

A He does not determine it?

Q No?

A As to what?

Q I meant the architect does not determine the compaction level, what that is, the specs --

A He determines what areas are going to be compacted, what locations have to be cut and have to be compacted.

Q He doesn't determine what the percentage will be?

A That is not in the criteria.

Q It is in the criteria but there is nothing he can do about that?

A There certainly is in his design, his design tells you you are cutting and the fill, I guess, that is what the plans are for.

Q You mean tells us how much dirt you have to bring in if you have to raise something?

A Yes.

Q What specifically was the compaction problem that you said you discussed with one of your associates?

A From the plans I couldn't determine what areas were cut and what areas were fill?

Q You could not determine that?

A Not on what I had the information, nor could my subcontractors, and in addition we couldn't determine it because of the information that is shown here (indicating on plans).

Q Now, I refer you to your own memorandum which has been entered into evidence as Defendant's Exhibit K which states that Mr. Moore of Island Construction indicated that their experience on the base showed that the large percentage of existing earth on the site would not meet the 95 per cent compaction required and that, "If the required compaction could not be met, new fill would be required," and that new fill would cost $2.10 per truckload per cubic yard.

A This means we would have to add a spreading compaction factor and compaction cost.

Q But you did say that, didn't you? That reflects your conversation with Mr. Moore?

A Not in its entirety.

Q Not in its entirety?

A He could not determine from the plans that he

was reviewing, the information we could see on the soil borings, the amount of additional dirt, etc., that would have to be brought in, we had no information, profiles, etc., showing these amounts.

Q Does the architect have to tell the land excavation contractor how much dirt to bring in?

A That is what the engineer is for.

Q Wederson weren't engineers, were they?

A They are site engineers.

Q I see, and the contractor couldn't do that?

A The contractor refers to the plans so that he can determine how much dirt is necessary. We rely heavily on the engineer's information.

Q Isn't it a fact that the only impaction problem you had was that Mr. Moore was telling you that he would have to bring in new dirt?

A I would advise Lafayette --

Q I am talking about you and Mr. Moore, that is what this memorandum refers to.

A Will you repeat that, please?

Q I am talking about your discussion with Mr. Moore that you referred to in this memorandum?

A Yes.

Q And is it not a fact that that discussion had

6

to do with the fact that you were having difficulty meeting the specified impaction level set forth in the Navy criteria?

A We couldn't tell if we could do it or not from the -- he couldn't tell, I couldn't tell from the information that was on our plans, we couldn't tell, that was our problem.

Q I see.

That is not what you say in this memorandum, is it?

A That is a brief -- let me see what it is. That was the problem, we couldn't tell.

(Document handed to the witness.)

A That is right. I am saying that we couldn't tell

Q Tell me where in that memorandum you say that the compaction problem was due to the drawings and not due to the specified requirements for compaction set by the Navy.

A It is very obvious that we are discussing the preliminary plans. He was reviewing the soil borings, the preliminary plans, and we could not tell whether the dirt would be this high (indicating) or that high (indicating) from the plans, and it is very important from what he says to determine and we have to go to the plans to determine that that is basic.

Q In other words, the contractor doesn't know how to bring in dirt and fill in a hole?

A He doesn't know how much dirt to bring into the hole and as to what type of dirt he has to be bringing into that hole in that area --

Q And that is --

A (Continuing) It must refer to the plans to tell you that information.

Q And that is what you say in that memorandum?

A I think the memorandum basically speaks for the general conversation that we couldn't tell.

Q How long have you been with National Homes?

A Six years.

Q I am sorry, had you been, you were with them six years altogether?

A That is correct.

Q Now, how much of that time did you spend as an estimator?

A Oh, I started working, doing take-offs with National Homes from day one on, from the time I was employed there, and because of the type of area I was in, from Mr. Loman and Mr. Limerman, Mr. Limerman and Mr. Loman, and I started take-offs from day one on different phases of work.

Q From day one with National?

A Yes.

Q When was day one?

A That would have been in approximately July 4th or 5th -- no, excuse me, July 1st, I believe, because I remember the 1st of July.

Q What year?

A '69.

Q '69.

And you were doing estimations during that entire period of time?

A I would be working on different projects all over on a constant basis.

Q You are familiar with how to do take-offs?

A I was semi-familiar because of some of the courses that I had at Purdue with the general concept of estimating and I was shown and directed and broken and trained.

Q Did you do take-offs as a part of your job at National?

A Yes, definitely.

Q Ever since 1969?

A Yes.

Q Now you testified previously there were no plantings shown on the site plans that you had when you were down there on April 2nd; is that correct?

A There were no what?

Q No plantings.

A When you say plantings, bushes?

Q Yes, shrubbery, things like that.

A They were shown but the sizes were not shown. It is very important, the size of the plant is very, very important to determine the cost, a contractor cannot give you a price without you showing the size of the plants, you must have that information.

Q Now didn't you testify this morning, Mr. Bolka, that you had no landscaping plans?

A I don't know for sure if I said landscaping plans -- yes, I did have landscaping -- I don't know for sure, that was one of the questions I was talking about originally in my notes, that I was talking about in my field notes which were used for the bidding, and in my field notes I did not, I couldn't tell the size of the plants. It was not indicated on the plans.

Q But you did have landscaping plans?

A That was one of the things that I definitely had down there.

Q When you testified this morning that you didn't have any landscaping plans, you were mistaken?

A If I testified I had landscaping plans, they were not detailed enough to get the information from those landscaping plans, and that was one of the reasons for my call

to the Wederson people to ask.

Q I am asking you about your testimony this morning when you said that you had no landscaping plans when you were down there in South Carolina, and I am asking you in view of what you said were you incorrect when you said that this morning?

A I don't recall for sure that Ididn't say. I didn't have landscaping, because I think I did have landscaping. If I said I didn't have landscaping plans, I was mistaken because I recall doing take-offs while I was down there.

Q You got these plans some time in March through Mr. Payne, these were the preliminary plans, the on-site plans?

A Maybe March.

Q Sometime in March?

A Yes.

Q And you went down to South Carolina on April 2nd?

A No.

Q I'm sorry, April 1st?

A Yes.

Q Okay, okay.

Now between the time you got the plans and the

time you went to South Carolina, did you do anything with the plans?

A I was doing preliminary take-offs. I must qualify that, that was preliminary guessing, almost.

Q How much, how much time would you say you spent during that time doing that?

A Well, from the preliminary checks I could have spent a considerable amount of time.

Q You could have or you did?

A I did.

Q Considerable time?

A Yes, daily I was working on those plans, looking them over.

You see, you can assume some things from your preliminary estimates and qualifying things and I would be spending more time calling and calling and calling and getting some material prices and ballpark prices, so when I got down there I could speak with these contractors as to exact costs, I would know exactly when I went in there so if he gave me a wild figure I would adjust it, but it was a preliminary type feasibility preliminary take-off, these were not final take-offs.

Q You heard my question before of Mr. Gleason this morning. What happens after you get the final plans, and

you also heard I am sure the testimony from Mr. Payne's deposition wherein he stated what happens after you have the final plans, and that is that you reconfirm the prices that you previously obtained:

Now, will you agree with that testimony?

A Repeat the testimony again because I don't think either one was telling you what I was doing, in neither one of those statements --

Q Mr. Payne's testimony which has been read and Mr. Gleason this morning's testimony was that after the final plans, you must "reconfirm" the prices with your subcontractors.

Do you agree with Mr. Payne that that is what you have to do once you get the final plans?

A You have got to do more than just reconfirm. You have to double-check.

(continued next page)

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Bolka-recross

Q Double-check?

A No. 1, the pages, every page you have got to double-check to make sure your take-offs, the quantities, are the same, etc., and what I would be doing is going into extensive preliminary take-offs trying to figure out exactly if we had enough sewer pipe, etc., etc., etc., etc. As you go through the information that you have to digest, you have so much to digest, so quickly, that you have to have these very -- well, you have to be very familiar with them --

Q Okay.

A (Continuing) But I might like to add on that it is only preliminary. It is only preliminary. You cannot finalize anything of the things that we did.

Q Now, where do you currently reside?

A Livonia, just outside Atlanta.

Q Where are youstaying now?

A At the Stanhope Hotel.

Q That is in Manhattan?

A It is over, on the other side of the river. I am not that familiar with New York. It is on Fifth and 81st St., I believe, across the river.

Q Is National paying your expenses?

A Yes, sir.

Q And they paid your transportation from Georgia

up to New York?

A Sure.

Q And you have been there since when, since last—

A Well, I was officially employed up until March 30th or whatever, the 31st, I guess, and I have been on a retainer handling different projects in the Atlanta area that I finished building. I still have the Thomasville project which is a major problem. We have to go back and double-check things and that type of thing.

Q You are still being paid by them on that?

A On a retainer, but it is not unusual for a Project Manager to be retained over on projects until the warranties, etc., are over.

Q Do you get paid by the day or hour or just what?

A It depends on what, on what the degree of difficulty is. I usually, well, National Homes, National Homes, I will charge anywhere from ten to twelve hours, usually $100 a day, not too much, in fact that is just about all I have, a charge the retainer and it fluctuates, some weeks I will work for National, for several months, three or four months I have not, but there are spans where I have to come in a few days.

Q Have you discussed with National Homes any compensation for testifying in this case?

A No, no, I have not.

Q You have not?

A No.

Q You have not asked them whether or not they intend to pay you?

A I will be. Well, one reason is that in fact -- well, I have talked with them. I have been seeing my brother. I hadn't seen my brother quite awhile and he lives up in New Jersey. I have been running over.

Q Is that the real reason you came here?

A I was hoping that it wouldn't take too long so I would spend more time with my brother. I have to be back in my business.

Q You are going to discuss after the case is over the question of compensation?

A Well, Mr. Duley did say just briefly that your present retainer commitment will be sufficient for your time here, which certainly doesn't cover what I have been missing when I am not in Atlanta, that is for sure, but I have people helping me to run my business.

MR. MORRISON: Your witness.

Oh, I have one further question , excuse me.

BY MR. MORRISON:

Q Did there ever come a time when you found out

about the names of various people who were bidding on the South Carolina project?

A Well, certainly. Everybody is trying to find the different names out. I never -- it was all hearsay. I had heard -- you mean the other general contractors? They were the same contractors who bid different jobs all over the country. I was semi-familiar with some of them.

Q That is something you tried to find out while still in the bidding stage; is that what you mean?

A No, it is not necessary. You just hear who they are. It is an irrelevant entity. It doesn't affect me. I heard about it but it is irrelevant whether I know who is bidding or not.

Q You did know who the other contractors were?

A I heard of this. I distinctly recall two contractors were bidding the existing one, Jewel Lake and MacDonald.

When you had six contractors submitting bids, it surprised me but I heard some of them pulled out at the last minute.

MR. MORRISON: I move to strike that.

Q Now, with regard to Jewel, they were the ones building the project on the adjacent site on the same base?

A They were -- excuse me, I am sorry. I lost you.

Q You mentioned Jewel Builders. Were they the builders who were building the project?

A I believe you asked me that before and I said yes.

Q I just asked you that again and the answer is still yes?

A Yes.

MR. MORRISON: Okay.

THE WITNESS: I remember that superintendent.

REDIRECT EXAMINATION

BY MR. SIMMONS:

Q Now, Mr. Bolka, by whom did you say you were employed?

A Now?

Q Yes.

A Georgia Residential Builders.

Q For the time that you are up here attending this trial, are you going to be paid by your employer?

A No, probably not. I own the company.

I haven't even thought about it. I am not on a salary basis.

Q So if you were not up here you would be back at home in Georgia making money?

MR. MORRISON: I object to that.

A That is for sure.

MR. MORRISON: That is leading.

Please, Mr. Simmons, that is your witness.

MR. SIMMONS: Please, please, please.

If you have an objection, please make it.

MR. MORRISON: Okay.

You don't like to listen to it.

MR. SIMMONS: Your Honor --

BY MR. SIMMONS:

Q Now, let us clear up once and for all what did you do when you went to South Carolina? Did you or did you not have landscape plans?

A Yes, I had preliminary landscape plans.

Q Now, did those landscape plans show you the detail as to the plantings, as you refer to on your testimony?

A It showed the locations, but there was no reference or no information as to the size.

Q What does that mean?

A Well, for example, a tree, you really want to measure. You have to know the diameter of the tree that you are going to plant, if it is a one-inch tree it is going to cost X dollars, but if it goes to two or three or two and a half or three inches, the tree, the price just goes up in multiples at a very fast rate.

Q You did not have that information?

A No.

Q Now you heard some of Mr. Payne's testimony read this morning as to your trip into Georgia, did you not?

A To tell you the truth, maybe I am --

Q To South Carolina, excuse me.

A Pardon me?

Q Did you hear his reference to that?

A Yes, but I really wasn't listening.

Q Do you recall these questions and answers being read:

"Question: In order to do these various things, the pricing, the subcontracting and so forth, did you need to have finished, completed plans in order to do all of that or to be working?"

The answer:

"Answer: To finalize the pricing, yes."

Then:

"Question: But you could begin working on pricing without having the final completed --

"Answer: Preliminaries, yes.

"Question: And did you in fact start working on those various aspects?

"Answer: Right. That was the purpose of the

backing in the material."

Do you remember that?

A Yes, yes.

Q Now, there was no inference made at that time in that excerpt as to when you went to South Carolina to do that, is there?

A No.

Q And were you able when in South Carolina to finalize the pricing?

A No.

Q Now, Mr. Bolka, when do the soil borings indicate?

A Well, they are generally subsurface examinations in different areas of the project.

Q Would the landscaping plans be a part of the submission for a proposal involving raising the land, lowering the land at various places?

A No, the landscaping would not identify the elevations, the grades.

Q What would identify the elevations and grades?

A The grading plans.

Q The grading plans?

A Yes, the grading plans.

Q Would the existing grading be accepted or

would changes be made by the architect on the grading plans?

I mean would grading be determined by the architect or merely reflected on his plans?

A The engineer-architect, in this case Wiedersum, would determine all the grades.

Q Would the soil borings indicate that?

A No, the soil borings would not indicate that, of the grades, no.

Q Did the plans that you had in South Carolina, did they indicate that?

A The grades?

Q Yes.

A No.

Q Is there a difference between grade and elevation?

A Well, to me, no.

Q Now, the criteria call for certain compaction, does it not?

A Yes.

Q Did the whole area have to meet that 95 per cent compaction?

A Only the street areas and the building areas, the driveway areas, I believe. I don't know. I am sure the sidewalks only have to be 90, the balance of it is 95.

Q No plantings.

Q The criteria tells you what the compaction is to be?

A Where it is.

Q I said the criteria, do they tell you what the compaction is to be?

A Yes.

Q But it doesn't tell you where?

A It doesn't tell you where, that is correct.

Q How would you determine the locations of the streets and the other things that you mentioned?

A Well, it would be on your -- you have like another grading plans and you try to determine from that where it would be but --

Q Who determines the location of the streets?

A The engineer.

Q And in this case?

A Wiedersum, but the things that I couldn't determine -- I could determine where the location of the building was. I couldn't determine the height and how much compaction, etc.

MR. MORRISON: I object to that. The witness is not responding to the questions.

THE WITNESS: I am sorry.

MR. MORRISON: He should respond solely to the

questions.

THE COURT: We have been over this a good deal. It seems to me it is repetitious.

BY MR. SIMMONS:

Q Now, what would happen, Mr. Bolka, with respect to subcontractors when revisions were made in the plans that you had submitted to them?

A They have to look at the plans and they have to take the plans and review them and re-bid on it.

Q Any changes would have to be shown to them?

A Yes.

Q Now, you referred earlier in your response, in your responses to Mr. Morrison about having started pricing and you made reference to unit pricing:

What were you doing, what were you doing in terms of coming up with unit pricing? What does that mean?

A It means you are trying to determine the cost of a unit of work, for example you were trying to determine sanitary sewers, how much per linear foot it is going to cost you for a certain size pipe --

Q You would be able to determine that from what you knew was it would cost per foot?

A No, I could not. I could guess but I couldn't determine it.

Q Couldn't you go to the subcontractors and determine what it was that he was selling the pipe at the unit price?

A For a specific job on a firm price basis, no, I could not, the reason for that being I couldn't tell certain information from those plans I had.

Q Could you determine the --

MR. MORRISON: I object again and request to strike.

Q Could you determine the quantities that you needed, the quantities of piping?

A No, I could not. I would have to know how deep the manholes were going to be in the ground if we were speaking about storm sewers and sanitary sewers.

Q Is it your testimony that even if you have the quantities, the price would depend upon how far down it would be?

A Well, in this case that watertable is a problem because if the watertable -- if a beach is below the watertable we have to pump out water to lay them.

Q If you have the quantity, you would still need to know how far down it was going to go and what the nature of the watertable would be?

A That is correct.

Q And you couldn't determine that?

A No, I couldn't.

MR. SIMMONS: No further questions, your Honor.

RECROSS-EXAMINATION

BY MR. MORRISON:

Q How do you determine the water level, Mr. Bolka?

A How do you determine it?

Q What is it, yes?

A You would look at the profiles which have the pipe, for example in this case the depth of what your pipe was going to be and if your pipe was not below where you -- well, it has got to be shown on the plans. It is the engineer that determines if there are water problems and at least the water table has to be on their plans, but it is not there.

Q ISn't it a fact that the watertable can be determined in the borings, you determine the watertable from the borings?

A The watertables were on the borings but the depth of the pipes weren't. I didn't know how deep I had to go with the pipe. I had to know the watertable in order to know my final prices.

Q Yes or no, wasn't the watertable shown in the borings --

A In the Navy plans?

Q The borings issued by the Navy.

A Yes.

MR. MORRISON: That is all.

THE COURT: Is that all with this witness?

MR. SIMMONS: Yes, your Honor.

THE COURT: All right, you may step down.

(Witness excused.)

MR. SIMMONS: The defendant calls Mr. Duley.

ARVIL HOWARD DULEY, residing at 1908 Hiawatha Lane, Lafayette, Indiana, having been duly sworn by the Clerk of the Court, testified as follows:

DIRECT EXAMINATION

BY MR. SIMMONS:

Q Mr. Duley, by whom are you employed?

A National Homes Construction Corporation.

Q And what is your position with National Homes?

A General Manager.

Q Are you an officer of the company?

A Yes.

Q And what are your responsibilities?

A At this time, I am finishing a project in Omaha, the project itself is a military project.

Q Now, are you familiar with the Warminster Project?

A Yes.

Q What is the nature of your information about that project?

A I was involved in the latter part of the Warminster project of 1971. I was instructed by my superior, John Gleason, at that time, to attend the pre-construction conference held at the project site.

Q What were your duties with respect to the Warminster project?

A At that time my duty was assigned to me as being the project coordinator of that project.

Q And what is the project coordinator?

A It would mean the responsibilities of taking the project, attending the meetings and making sure that the pricing, etc., etc., etc., was in proper order, the plans that were developed were proper, and that the bid -- that the process of bidding was proper.

Q Who was the project coordinator for the South Carolina project for National?

A For National Homes?

Q Yes.

A John Gleason.

Q And you were Mr. Gleason's counterpart for Warminster?

A Yes, that is right.

Q Who was your prime contact at Wiedersum in connection with the Warminster project?

A Al Voorneveld.

Q Now, did there come a time, Mr. Duley, when you received preliminary plans in connection with the Warminster project from Mr. Wiedersum, from Wiedersum Associates?

A Yes.

Q Do you recall approximately how much ahead of the submission date that was?

A The preliminary plans were about a month in advance of the contract proposal date. That date was extended so actually, you know, it was more than a month, the date was extended, I think, twice on that project.

Q So about how long would it have been?

A Probably closer to 45 days, and then I think there were two extensions on it: It has been a long time ago.

Q About 45 days?

A Right.

Q Now, how long prior to the submission date did you receive the actual plans that were submitted in connection with that project: Do you recall exactly?

A I don't recall exactly.

Q Let me show you what has been marked and admitted into evidence as Defendant's Exhibit C. Does that refresh your recollection as to how long prior to the submission you received the submittal plans?

A This is dated February 8th. It is a transmittal letter transmitting the final plans to us, the appropriate sets, but offhand I don't recall what the submittal date really was.

18

Q Take a look at the latter part of paragraph 1.

A It says -- okay -- that it was to be submitted on February 18th. This letter is dated February 8, 1972.

Q A ten-day period, does that sort of fit with your recollection?

A It was --

MR. MORRISON: I will object to that. He has already testified he did not have a recollection.

BY MR. SIMMONS:

Q Do you have a recollection after looking at this, Mr. Duley?

A That has to stand for itself.

Q Now, what did you do with those plans after you received the, the submittal plans?

A What did we do with those submittal plans?

Q Yes.

A We reviewed them and compared them with the plans that we had, the preliminary plans, to make sure that they had the corrections necessary for submittal.

Q And what else did you do? Were any revisions made?

A To be honest, I don't remember whether there were revisions made or not. We were constantly revising plans, but whether revisions had been made on those plans, I don't

recall.

Q Were those plans shown by you to your subcontractors?

A Yes, they were.

Q Now, did you have any duties, Mr. Duley, with respect to the South Carolina project?

A Yes, because of my familiarity with the Warminster Project I was asked by John Gleason to call Wiedersum's office and procure the necessary bid documents and to review those bid documents and turn them over to Mr. Gleason for finalization.

Q Now, what did you do after Mr. Gleason made that request?

A I called Wiedersum's office. I requested the bid documents which they sent me.

Q Do you recall when they sent them to you?

A It was on the 30th.

MR. SIMMONS: Will you mark this, please?

THE CLERK: Letter from Frederick P. Wiedersum Associates dated March 30, 1973 marked for identification as Defendant's Exhibit L.

(So marked.)

THE CLERK: Bid documents marked for identification as Defendant's Exhibit M.

(So marked.)

MR. MORRISON: May I see those?

(Documents handed to Mr. Morrison)

MR. MORRISON: I have objection to the description of Defendant's Exhibit M as bid documents, there is nothing on here that says these are bid documents. They are simply a group of documents.

MR. SIMMONS: I will identify them as a group of documents and I will have the witness testify as to them.

MR. MORRISON: Thank you.

BY MR. SIMMONS:

Q Mr. Duley, I ask you to look at Defendant's Exhibit L and ask you to identify that.

A Yes.

Q What is it, sir?

A It is a letter I received after my request for bid documents. The covering letter says --

Q Yes, would you read it, please?

A This came to my attention.

"Gentlemen:

"Enclosed are the bid documents for the naval housing project at Charleston, South Carolina."

It is signed:

"Very truly yours,

"William G. Laverty."

Q Is there a stamp at the top, and what does that indicate?

A It indicates that it was received on April 2, 1973.

Q What does that indicate?

A It indicates when it was received in our office.

Q Now, what did you receive along with Defendant's Exhibit L for identification?

A A packet similar to this right here (indicating) which contained the bid documents I had requested.

Q I ask you to look at Exhibit M for identification.

Can you identify that, that packet of documents?

A This is the bid documents that came with that letter.

MR. SIMMONS: Your Honor, I ask that these two documents be admitted into evidence.

THE COURT: Any objection?

MR. MORRISON: No.

THE CLERK: Documents marked for identification

as Defendant's Exhibits L and M now received in evidence.

BY MR. SIMMONS:

Q When did you see these documents, Mr. Duley?

A It was on the 2nd of April, April 2nd.

Q Did you receive any plans in connection with them, were there plans attached to them when you received them?

A No, there wasn't.

Q There has been some testimony, Mr. Duley, that plans were sent along with these documents.

Do you know anything about those plans?

A No, I don't, sir.

Q You d id not receive them?

A I did not receive them.

Q Do you know who did?

A No, I don't.

Q Now, what did you do, Mr. Duley, after you received these two documents?

A Since they are technical in nature, I had to review the other criteria for the project, basically the criteria as supplied by the Navy which we call the specifications, etc.

Q And what did you do after reviewing the criteria?

A I had penciled in portions of those bid documents and had given them to Mr. Gleason.

Q On these actual documents or on a copy?

A I think they had sent, and I did not count those there, but I didn't see my penciled markings on any of those. I had my girl Xerox -- I really don't remember. I just remember penciling in some of the details on that, just penciling them in.

Q You examined them against the criteria for what purpose?

A The criteria spell out a lot of information that is required in the bid documents. The bid documents are a Navy form printed by the Navy which has some spaces that we have to fill in. These spaces are important because they do spell out room sizes, they spell out other requirements of the bid that have to go in. In fact, one of the documents that is attached there is actually the construction contract which would be executed if our bid was accepted.

Q When these documents are filled out and the exhibits or whatever else has to go is annexed, does that constitute the proposal?

A Pardon me?

Q When these bids, these documents are filled out and the planned annex and whatever else has to be annexed,

24

does that constitute the proposal?

A Yes, it does.

Q These documents physically become a part of the proposal?

A That is right.

Q Now, was it necessary for you to examine plans in order to do what you were assigned to do by Mr. Gleason in connection with this project?

A No, it wasn't.

Q When you call the Wiedersum office and asked for the bid documents, did you use that term?

A Yes.

Q Did you ask for plans?

A No.

Q Did anyone tell you that a set of plans might be sent with these documents?

A No.

Q Do you know if a set of plans were sent with these documents?

A No.

MR. SIMMONS: I have no further questions.

CROSS-eXAMINATION

BY MR. MORRISON:

Q Mr. Duley, in the Warminster project when the

final drawings were forwarded to you on February 8th, as you have testified to --

A They were forwarded to John Gleason's attention, I think the letter said.

Q Do you recall if you received those plans on that date, on February 8th?

A I am sure we didn't receive them on that date, I am sure it might have been a day later because they didn't come by, you know, other than airline.

Q They were put on an airplane, they were put on a domestic air flight?

A It wasn't put on an airplane, no.

Q It would have been at least February 9th or maybe the 10th that you got them?

A At the same time there were other plans picked up at Wiedersum's office and delivered to the job site, at that time we had headquarters in the area of Warminster which was at Willow Grove, Pennsylvania, and there was another set of those same plans taken to the site, taken to the site to show the subcontractors.

Q And somebody from National's office picked those up in New York?

A Yes, they did.

Q And took them to the site?

A Yes, they did.

Q Now, you have testified that when you called Mr. Laverty with regard to the South Carolina project you asked him for the bid documents; is that correct?

A I'm sorry, I didn't say that, sir.

Q What did you say?

A I said I called Wiedersum's office.

Q You don't know whom you talked to?

A I spoke to Al Voorneveld.

Q And you asked Mr. Voorneveld for the bid documents?

A For the bid documents, yes.

Q You testified that what you received were the bid documents?

A Yes.

Q Now, do you recall my taking your deposition last February?

A Yes, I do.

Q Do you recall me asking you about this episode on your deposition?

A Yes.

Q Do you recall what you said?

A Could I say something?

Q Just answer the question.

A Okay.

Q Do you recall us going over this ground?

A I sure do.

Q And do you recall that you testified about calling Wiedersum's office to get these documents?

A Yes.

Q You didn't call them bid documents then, did you?

A I haven't read my deposition for at least two weeks, so I don't remember.

(continued next page)

Q You don't remember what phrase you used?

A No, I don't.

Q Isn't it a fact that when you testified on your deposition you called them contract documents?

A I don't know. If you let me read it I can refresh my memory.

Q I will read it for you.

A Okay.

Q "Question: Turning" --

MR. SIMMONS: May we have the page?

MR. MORRISON: Page 30.

BY MR. MORRISON:

Q "Question: Turning to the South Carolina project, did you have involvement in that?

"Answer: Yes.

"Question: What was that involvement?

"Answer: Prior to the submittal of the final documents I made a call to Wiedersum's office and requested that they send us specific items for the submission that has to do with contract documents, which are the Navy forms which are required to be filled out by the person making the submittal of the bid as well as the contract number."

Now, on page 32:

"Question: What specifically were these, you referred to them as contract documents.

"Answer: Contract documents."

So you didn't call them bid documents.

A At that time I was calling them contract documents, yes.

Q Are they one and the same or something different?

A I don't know. I really don't know if they are one and the same. What I see now when I see the cover letter is they are bid documents.

Q But you referred to them as contract documents before?

A That is right.

Q And you are referring to the same thing?

A These are bid documents.

Q Are they bid documents or contract documents?

A Back at that time, if you remember, sir, I had not reviewed anything in this case at all. In fact, on two hours' sleep I gave my testimony, as you remember.

Q The question is what are you referring to on your deposition when you said contract documents?

A When I gave my deposition I was referring to contract documents.

Q Okay. And you are using that in the same sense that you are now using bid documents?

A That is right.

Q Bid documents, you were using them interchangeably, you use that in the same sense on the deposition that you are using bid documents today?

A I used the contract documents on my deposition from what you just read. I am saying they are bid documents now.

Q And you used them, you referred to the same thing on your deposition that you are referring to now?

A I am referring to that packet right now that is the exhibit.

Q Okay.

Isn't it a fact, Mr. Duley, that the contract documents have a defined meaning in the trade?

A Yes, they do.

Q And what do they refer to?

A It refers to that packet which you see there.

Q What you call the bid documents?

A Pardon, will you repeat the question again? I thought you said bid.

Q I said contract documents.

A Oh, okay.

Q You say they refer to that?

A The contract documents have a specific meaning in the trade, yes.

Q And they refer to these forms that you submit to the Government?

A No, those are bid documents there.

Q These are bid documents?

A Yes.

Q What do contract documents refer to?

A Contract documents is a broad word. If you would let us get the terminology up here, I will be glad to read it to you.

Q You tell me what you understand contract documents to mean.

A Contract documents?

Q Yes.

A Can include a lot of items.

Q Such as what?

A But basically a contract document is described in the AIA manual as a form.

Q It is a form?

A It is a form.

Q It is a form similar to what you have testified to here today?

A It is physically the same size, yes.

Q Does it serve the same purpose?

A It includes some of the same things, but it is not documents supplied by the Navy.

Q Do contract documents include plans?

A Do contract documents --

Q The phrase contract documents as used in the trade.

A Absolutely not.

MR. MORRISON: I ask that this be marked as Plaintiff's Exhibit 35.

THE CLERK: Four-page document marked for identification as Plaintiff's Exhibit 35.

(So marked.)

BY MR. MORRISON:

Q Mr. Duley, I show you what has been marked as Plaintiff's Exhibit 35 for identification.

Can you tell us what that is?

A Yes.

MR. SIMMONS: Can we see it?

MR. MORRISON: Oh, sure, I am sorry.

(Document was then handed to Mr. Simmons who after perusal returned it.)

BY MR. MORRISON:

33

Q Mr. Duley, I ask you to read the heading across the top of this.

A "The American Institute of Architects," it is an AIA document AES01.

It is a standard form, an agreement between the owner and the contractor.

Q Okay.

I direct your attention to page 2 of this, under Article 1, and would you please read Article 1?

A "The contract documents consist of this agreement, conditions of the contract (general supplementary and other conditions), drawings, specifications, all addenda issued prior to the execution of this agreement and all modifications issued subsequent thereto. These form the contract" --

Do you want me to continue?

Q No, that is sufficient.

They use the word "drawings" in there, do they not?

A Has anybody explained to you what that form is, sir?

Q I am asking you, just does it use the word "drawing"?

A They use the term "plans," yes.

Q Pardon?

A "Drawings."

MR. MORRISON: I offer this into evidence as Plaintiff's Exhibit 35.

MR. SIMMONS: Objection, your Honor.

THE COURT: Overruled.

THE CLERK: Document marked for identification as Plaintiff's Exhibit 35 received in evidence.

(So marked.)

BY MR. MORRISON:

Q Now, let me make sure I understand your testimony:

Is it your testimony that you don't know whether in fact plans were received by National Homes in connection with Mr. Laverty's letter of March 30th, or is it your testimony that they were not so received?

A My testimony is that to my knowledge I did not receive those plans. I received the contract documents as I testified to.

Q But you don't know whether anyone else at National received the plans?

A I -- I don't know that, sir, no.

Q You heard Mr. Gleason testify in court that on April 2nd he had in his office the final drawings.

Does that refresh your recollection?

A No, it doesn't, sir.

MR. SIMMONS: Objection, your Honor.

I don't think that was Mr. Gleason's testimony. I think he testified that he had a set of drawings identified as Exhibit 11.

THE COURT: Overruled.

BY MR. MORRISON:

Q Is it your recollection that you don't know whether you received them or you don't recall receiving them, the plans?

A I think I answered that question, but I will answer it again if you would like to hear it.

Q Yes.

A I answered what I received in my office was the contract documents, I said I did not know whether anybody else in the company had received plans or not.

Q Now, do you recall whether you yourself received the plans along with Mr. Laverty's letter?

A I did not, no.

Q Youdid not receive them?

A I did not receive the plans.

Q Is that what you aid on your deposition?

A I think on my deposition I said I didn't recall

receiving anything except the contract documents.

That has been a couple of months since I gave that.

Q In fact, you said in your deposition that you didn't recall one way or the other whether anything else was with the documents that you referred to as bid documents.

A That possibly is true. You have read it since I have.

Q Is that your recollection today?

A No, it doesn't --

Q You have a different recollection today?

A I sure do. I sure do.

Q What sparked that different recollection?

A I got a call from my attorney. I think he was answering a set of interrogatories or something, and he says, " I have a folder here and I would like to read what is in this folder."

I said, "Fine."

So he started reading me what he had in a manilla folder that came from my office in Lafayette and it sparked my mind when he went through that folder because he not only read what I said to him was the contract documents, he read my pencilled notes out of the set of standards submitted to us by the Air Force with my paper clips and with

my notes beside them and some drilling notices in those documents.

Q I see.

And it is your testimony that if you had received the plans on the 30th that they would have still been in this manilla folder a year later?

A Oh, no, but it did refresh my memory as to that time as to what I actually received on my desk because it was in this folder, the whole packet.

Q I see.

But if plans had been received they would not have come to you on the 30th?

A No, they would not have come to me.

Q You weren't involved with plans --

A No, absolutely not --

Q You were involved with these contract documents.

(There was no answer to the last question.)

MR. MORRISON: I have no further questions.

THE COURT: We will take a ten-minute recess at this point.

(Recess)

(continued next page)

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REDIRECT EXAMINATION

BY MR. SIMMONS:

Q Mr. Duley, Plaintiff's Exhibit 35, does that have anything to do with the turnkey project?

A No, it does not.

Q It had no application whatsoever?

A No.

THE COURT: Any further questions?

MR. MORRISON: I have no further questions.

MR. SIMMONS: Your Honor, I have one more item as part of the defendant's case.

I would like to ask that the complaint and our answer be deemed admitted into evidence.

MR. MORRISON: That is improper, your Honor.

THE COURT: That is not customary, counsel. The pleadings are always before any Court.

MR. SIMMONS: I just wanted to make sure they would be before the jury.

THE COURT: They are not marked in evidence.

MR. SIMMONS: Defendant rests, your Honor.

THE COURT: Both sides rest?

MR. MORRISON: I have some very brief rebuttal, your Honor.

THE COURT: All right.

2 1

Duley-

MR. MORRISON: First of all, I wish to read into the record an additional interrogatory answer given by defendants. This is an answer in interrogatory No. 4 and the preceding question was:

"Was there a decision not to submit a bid on the South Carolina project?

"Answer: Yes.

"INTERROGATORY 4: If the answer was in the affirmative then I ask for certain information. Item C calls for the following: State the reasons for defendant's decision not to submit a bid on the Charleston project.

"Answer: The reason for the decision not to submit a bid for the Charleston project was the failure of Plaintiff to submit plans on time, problems with the soil conditions of the project, location and the inability to get bids from subcontractors for necessary land improvement work."

I will recall Mr. William G. Laverty.

WILLIAM G. LAVERTY, called as a witness, having been previously duly sworn, was recalled to the stand and testified further as follows:

THE CLERK: You have been previously sworn, Mr. Laverty.

DIRECT EXAMINATION

BY MR. MORRISON (Rebuttal):

Q Mr. Laverty, I direct your attention to the period between March 29 and April 6, 1973. During that period do you recall any telephone discussions with Mr. John Gleason of National Homes regarding the plans on the South Carolina project?

A Absolutely not, sir.

Q Have you ever had occasion to use the phrase contract document?

A The phrase contract document, yes.

Q Have you had occasion to use the phrase bid document?

A Yes, sir.

Q Do these mean different things to you?

A No, they mean the same thing, sir.

Q What do they mean to you?

A They mean drawings, specifications, other data pertaining to putting up a bid proposal contract.

Q And when you sent your letter of March 30, 1973 to Mr. Duley and used the phrase "bid documents" to what were you referring?

A Plans and any Government forms I was sending to Mr. Duley.

MR. MORRISON: No further questions.

CROSS-EXAMINATION

BY MR. SIMMONS:

Q Mr. Laverty, did you speak with Mr. Duley -- did Mr. Duley see you in connection with the bid documents? Did he call you?

A I believe I called him, sir.

Q Mr. Duley testified he needed the bid documents.

A Yes, sir.

Q And that he called someone at Wiedersum and asked for those documents.

A Yes, sir.

Q Did he speak to you or call you?

A No, he did not. He said he spoke to Mr. Voorneveld

Q He spoke to Mr. Voorneveld?

What did Mr. Voorneveld say that Mr. Duley needed? Did he mention the documents to you?

A He said he needed Government forms.

Q And when you called Mr. Duley, I believe you said

you did call him, did you tell him you were sending him the Government forms?

A With the plans, yes, sir.

Q You told Mr. Duley you were sending the plans to him?

A I told him the package with the plans and the Government forms were going on the airplane.

Q I am asking you, did you refer to plans to Mr. Duley or did you tell him this package was going to arrive?

A I do not recall my exact wording.

Q You do not recall, then, whether you specifically mentioned plans to Mr. Duley; is that right?

A That is right.

Q Other than Mr. Duley, who did you speak with at National during the period after March 30th?

Did you have any conversation?

A After March 30, the only one I remember contacting was Mr. Payne's office.

Q Now what was said in that conversation?

A That the plans were on their way.

Q The plans were on their way?

A Yes, sir.

Q Did you hear Mr. Voorneveld testify that

Exhibit 16 had certain minor revisions that --

MR. MORRISON: I object to that, that is clearly outside the scope of the direct examination.

THE COURT: That is true.

MR. SIMMONS: Your Honor, I believe I can connect it.

THE COURT: Well, you disagree with me. Lawyers do once in awhile.

MR. SIMMONS: I have no further questions for this witness.

THE COURT: Is that all?

MR. MORRISON: I am done with this witness, your Honor.

I would like to recall Mr. Voorneveld.

A L B E R T V O O R N E V E L D , called as a witness, having been previously duly sworn, was recalled to the stand and testified further as follows:

DIRECT EXAMINATION

BY MR. MORRISON (rebuttal)

Q Mr. Voorneveld, when Mr. Gleason was testifying regarding the two sets of drawings which has been sent by Wiedersum to National Homes, he stated that there were some substantial differences on those drawings and he disagreed with your opinion that they were only minor differences. One item he mentioned was an addition of tot lots. Would you tell us what tot lots are?

A A very minor part of the project. A tot lot is simply a defined area. It is an allocated area of lawn on which little children canplay supplied with a sand box or slide which you might have in your backyard or something like that. It is a very minor thing.

Q Would the addition of the tot lot affect in any way the pricing on the project?

A On the project of this size it is insignificant.

Q Mr. Gleason also mentioned the addition of parking spaces.

A He was right, there were eight parking spaces. We estimate them to be worth about $800 which again I consider

insignificant on a project of this size.

Q Mr. Gleason also mentioned a chance in a roof line on one of the drawings.

A Yes, the roof line change. We had a break in the roof which made it necessary on each unit for them to make one special panel and he changed that so that they did not have to make any special panels. They manufacture these things in mass production and that was to save money and I am sure it was probably discussed with National.

Q Would that make the price lower?

A Yes.

Q Rather than higher?

A It would reduce the price, but that was the change, Mr. Gleason was right on that.

Q Would it have affected the price?

A It was insignificant and the effect on the price would be to reduce the price.

Q There was mentioned a change in elevation of window.

A He was right, there was one window on the front elevation of one building not in the same place on the elevation as shown on the plan. However, they had to buy a window whether they put it here or two feet over there so the cost meant nothing whatsoever in cost.

Q In terms of the overall pricing?

A In any way, no.

Q Mr. Voorneveld, during your career you have been involved in estimating prices on construction projects, have you?

A Yes, I was estimator for South Bay Construction Corporation, 11 Broadway in 1950 and 1951.

Q And what about your present duties, are you at all involved with estimating?

A All the time. We contractors, we are constantly receiving prices for additional work and so forth, and we have an estimating department in the firm where three people estimate general construction, mechanical electricity, and I am involved with them on a regular basis.

Q Referring you to the meeting of March 6th in your office, which has been testified to by various people, the evidence shows that there was some sort of plans given to National at that meeting; do you recall it?

A Yes.

Q What exactly did those plans consist of?

A The plans consisted, I think the thing of contention here was the head elevation, the head sections, the head floor plans, but they had a well-developed grading plan on which the grades for the existing site which were shown and

the finished grades were shown, the roads were shown, the sidewalks and if not shown could have easily been taken off. It says in the specifications they will be on either side of the road but there was no --

Q Slow down, Mr. Voorneveld, so that we can get what you are saying.

A But there was no reason in the world why the cut and fill, in other words, the topographical changes on that site could not have been taken off and price

Q What about things such as concrete and asphalt?

A Concrete and asphalt were within close tolerances and could have been estimated from that plan. All the roads and buildings were shown. They knew the specifications for the foundation. It could have very easily been done.

Q What about such things as wall panels and roofing plans?

A That I do not think they could come up with real prices unless National might well have been able to price them because the dimensions were there for exterior walls which they were primarily involved with.

Q Where would the dimensions be?

A On the plans. Mr. Gleason said he looked at

the plans and he gave it a quick look and some of the dimensions were missing. Possibly he is right -- exterior dimensions I wouldn't doubt a bit, but they were not necessary to calculate the cost of the panels.

Q What about in general things relating to the land, the grading, that sort of thing, can that be done from those plans that were given?

A Yes, sir.

Q Would Wiedersum have retained a copy of whatever plans were given to National on March 6th?

A No, because the plans that you have here, they are what we started out with originally, a tracing. People work on this, they keep drawing on it. At one point we printed that, that is the preliminary plans we are speaking about here. That same tracing was developed until its final form you see here, unless we kept a sepia, but at the time we didn't for further reproduction --

Q So a copy was given National on the 6th?

A Unless they have their copy we do not have a copy in our office.

Q In your opinion, could National have completed the pricing on that job assuming they received the plans on the 30th?

MR. SIMMONS: I object, your Honor. He has not been qualified as an expert.

THE COURT: Sustained as to form.

Q Do you have any opinion as to whether or not based upon what was given to National on March 6th and what was given or sent to them March 30, do you have any opinion as to whether or not a final price could have been computed on the basis that --

MR. SIMMONS: Objection again.

THE COURT: Overruled.

A My opinion is that if National had sent the plans they had in their office on April 2, that subsequent offer there, they could have priced this job out and very efficiently.

THE COURT: Is that all of this witness?

MR. MORRISON: Yes, your Honor.

CROSS-EXAMINATION

BY MR. SIMMONS:

Q Mr. Voorneveld, what were the plans to be submitted to the Navy, were they Exhibit 16 or Exhibit 11?

A The later date, whichever that is.

Q That one sent out on the 5th?

A That would have been them, yes.

Q You mentioned a change, the tot lot; is that right? How many changes are there in tot lot between Exhibit 11 and 16, how many exist?

A On one drawing I believe.

Q On all the drawings as part of the proposal?

A I think there were one or two added.

Q Were locations changed?

A I wouldn't doubt it.

Q Were elevations changed?

A No, not on the tot lots.

Q What about parking space? Were elevations changed?

A To my recollection, no.

Q Is it possible they were?

A I am not infallible. If I saw it I would have said yes. I did not see it..

MR. MORRISON: Objection.

THE COURT: I will sustain the objection.

A I said I didn't see it.

Q Did any of the changes between Exhibit 16 and that from those made on Exhibit 11, did they involve excavation work?

A The entire site is a cut and fill proposition, if that is what you are speaking of. Excavation, earth moving is what is involved, not excavation per se.

Q Did any of the changes involve earth moving?

A Yes, they all did.

Q Do you know how much?

A To a very slight degree.

Q Do you know how much?

A Very slight degree, negligible.

Q Could prices have been determined from the preliminary plans that you referred to?

A For cut and fill for road work, yes.

Q What could prices not be determined for?

A I believe you would have a tough time pricing out the structure because we only had an elevation of a section. Again, National is an expert in this. They manufacture components. If they could have put the structure together they could have put the whole thing together.

Q Apart from the structure what other things could not have been priced?

A Landscaping.

Q What else could not have been priced from the preliminary plan?

A Many things, I am sure.

Q What are they?

A Well, the structure I did say.

Q Apart from the structure.

A Utilities.

Q What else?

A That is about it.

Q I thought you said many things.

A There are many things when you consider how many things go into a utility line.

Q Anything other than utility and landscaping?

A And the structure, I said.

Q Apart from the structures, utilities and landscaping?

A As far as the site is concerned, the only thing you could not have priced out from that preliminary plan would be your utilities and landscaping, if that is the answer you want.

Q Could you determine how much earth would be moved?

A Yes, sir.

Q You referred to a couple of tot lots being moved and a few added. How many parking spaces were added?

A Eight, I understand, from what Mr. Gleason testified.

Q I think he spotted a parking lot with eight spaces.

A Right.

Q How many other parking lots?

A Fourteen, altogether, to the extent of about

$1,400.

Q Fourteen parking spaces, fourteen parking spaces or lots?

A Spaces.

Q Spaces for fourteen cars?

A For cars.

Q Only fourteen cars?

A Yes, unless my count is wrong, but if there is more it is $100 a space so it is not a big thing.

Q Have you looked at the exhibit since Mr. Gleason's testimony?

A I surely looked at it very clearly with Mr. Gleason.

Q Did you make an attempt to count how many parking lots were added?

A I am not positive on fourteen. My recollection it is $2,000 instead of $1,400, if there were fourteen.

THE COURT: Is that all of this witness?

MR. SIMMONS: I have no further questions.

THE COURT: You may step down.

MR. MORRISON: I have nothing further.

THE COURT: Both sides rest?

MR. SIMMONS: No, your Honor, I would like to call Mr. Gleason to the stand.

MR. MORRISON: Your Honor, I would object to this rebuttal.

THE COURT: This is really getting beyond the normal procedure with all these recrosses and all that. There is a great limitation on that when you get into that area. You can only as a rule refer to something that has been immediately presented by the other side on redirect. You are getting way beyond the normal procedure.

MR. SIMMONS: Your Honor, that is what I want to do. I want to call Mr. Gleason to testify to things put on just now in Plaintiff's rebuttal.

MR. MORRISON: We can go all over all the information. Mr. Voorneveld was rebutting Mr. Gleason, what he said.

THE COURT: Yes, I would say the case is concluded.

Members of the jury, the part of the case which consists of the testimony of the Plaintiffs and Defendant has been completed. What remains is the summation of attorneys and the charge by the Court. We will try to expedite it tomorrow and so if you do not disagree we will change our reporting time to 10:00 o'clock so we can expedite the case tomorrow.

You are excused until that time.

(The jury left the courtroom and the case was adjourned to 10:00 A.M. the following day.)

* * *

INDEX

Witness	Direct	Cross	Redirect	Recross
John Gleason		3	34	52
Michael Bolka	56			
Arvil Duley	126	135	149	
William Laverty	151	152		
Albert Voorneveld	155	160		

EXHIBITS

Plaintiff's Exhibit No.	Description	For Id.	In Ev.
35	Seven-page document	143	145

Defendant's Exhibit No.			
J	List of calls	64	64
K	Summary of field notes	67	75
L	Letter	130	133
M	Documnt	131	133

Trial Tr. 625 686a
Vol 5
pp. 625-701
Summation
Charge

UNITED STATES DISCTRICT COURT

EASTERN DISTRICT OF NEW YORK

----------x

F. P. WEDERSON ASSOCIATES, :

Plaintiff, :

-against- : 74-C-823

NATIONAL HOMES CONSTRUCTION CORP., :

Defendant. :

---------- x

United States Courthouse
Brooklyn, New York

December 12, 1975
10:00 o'clock A.M.

B e f o r e :

HONORABLE WALTER BRUCHHAUSEN, U.S.D.J., and a jury.

HENRI LE GENDRE
OFFICIAL COURT REPORTER

Appearances:

MESSRS. ROGERS & WELLS
Attorneys for Plaintiff

BY: THOMAS C. MORRISON, ESQ.
of Counsel

MESSRS. MILBANK, TWEED, HADLEY & MC CLOY
Attorneys for Defendant

BY: HARRY L. SIMMONS, ESQ.
-and-
RUSSELL E. BROOKS, ESQ.
Of Counsel

THE CLERK: Wederson versus National Homes Construction.

THE COURT: You may proceed.

MR. SIMMONS: Your Honor, at this time I ask for a directed verdict pursuant to Rule 50 on the grounds that the plaintiff has not established a case. The evidence has shown that there was no agreement; the evidence further shows there has been no damage to the plaintiff in this case.

It is shown that the document, the plans were not delivered timely to the defendant and that they were not sufficient; and in addition to the fact that --

THE COURT: Motion is denied.

MR. SIMMONS: May we have your charge at this time.

Mr. Brooks

~~MR. MORRISON~~: Under Rule 51 it provides that counsel is provided your charge before the summation begins.

THE COURT: I've never done that. It works out very well. Wait till the end. You can make your exceptions. That's what I will adhere to. So you may proceed, gentlemen.

Bring in the jury.

(Whereupon, jurors enter the courtroom and are now seated in the jury box.)

THE COURT: Good-morning, ladies and gentlemen. Bring in the jury.

(Whereupon, jurors enter the courtroom.)

THE COURT: Proceed, Mr. Simmons.

MR. SIMMONS: Good-morning, ladies and gentlemen. We have heard all of th eevidence in the case, what I'm going to do at this point is give you my contention as to what the evidence has shown.

It is merely my interpretation of the evidence, it's not evidence. The evidence you have heard over the last few days came from the witness stand and you'll soon see in the form of the exhibits that are to be sumitted to you for your consideration.

Likewise, Mr. Morrison in a few moments will give you his contentions as to what the evidence has shown. Needless to say, that also is not evidence, it's his contention.

What is the case all about? The plaintiff contends that the defendant made an unequivocal commitment; that if the plaintiff started to work on plans for the South Carolina project, the defendant would put in a proposal. It claims that it submitted those plans on time and that for an unknown explanation the defendant failed to submit a proposal as it was bound to do.

Now, the defendant contends that there was no such commitment. Indeed, it would never make such a commitment, no construction firm could make a commitment before a decision or commitment to put in a proposal. They have to be seen, they have to be examined, they have to be reviewed. For all a defendant or construction company would know we may be talking about a South Carolina project, housing facilities, and the plaintiff might well be drafting plans for a bridge. It's a ridiculous contention that defendant would make such a commitment prior to seeing anything.

There are reasons why so early in the game, certainly before the plaintiff started to work, that the defendant did not make such a commitment. At the time that proposal is submitted, the defendant puts up a bond, as the evidence has shown, that it will complete the building if it's awarded the contract at the prices shown; the prices that are part of the proposal.

The plaintiff here contends that the agreement was made over a month and a half prior to it s admission date at the time that the proposal was to be submitted; that a proposal is to be submitted.

It's conceivable that labor problems may well have arisen in the area. It's conceivable that additional facts may have come to light. You have soil borings, there is testimony as to those, but those are no guarantees as to what the conditions are. There is admission that granite might be located below the ground. To make the contention that the defendant in this case made such an agreement so long prior to the pre-proposal date is ridiculous.

And, further, defendant contends that the plans did not arrive on time; that once the plans arrived various things have to be done. You have heard testimony that the defendant had to go to a sub-contractor; that it had to obtain firm commitments as to the price they would supply materials; the price that they would do work, this all takes time.

Thepleadings in this case that I will refer to a little later indicate that the plans for this project were submitted to the defendant on the 4th of April. From the testimony that's been given in the case, we know what is being referred to are the plans that were included with Mr. Lafferty's letter of April 4; that indeed was sent out on April 5. Those were the plans that were submitted in this case.

Now, before I get into the evidence to any extent, let me point out a number of preliminary considerations. His Honor will instruct you that the plaintiff has the burden of proof in this case; and his Honor will explain what that burden is -- proof to you through a preponderance of the evidence. A preponderance of the evidence will be explained to you what is involved here. I ask you to keep that in mind as you hear the contentions as to my client; the contentions being made on behalf of Mr. Morrison's client. There is one other matter, and that when you were sworn in to serve as jurors, you don't leave your common sense at home, that comes to Court with you, and you can listen to the testimony and examine the documents in light of your common knowledge, what you know makes sense, and I ask you to do that in this case.

Now, his Honor will instruct you in order for the plaintiff to recover, there must have been a duty, a duty on defendant's part and plaintiff contends that that duty had to do with a contract that we agreed -- that we promised; that if indeed they started to work on final plans that we would submit a bill.

Now, when did that agreement take place? When was it entered into? The testimony and the exhibits show that the South Carolina project wasn't called to National's attention until January 23 when Mr. Lafferty said they sent a letter to Mr. Gleason. At the time Mr. Lafferty sent that letter, which is Plaintiff's Exhibit 4, the only information that he had, the testimony has shown, was a 1-page document, Plaintiff's Exhibit 3.

You have heard Mr. Wederson testify what Mr. Lafferty's authority was, he said, "I gave him authority to bring this to the defendant's attention. I gave him authority to bring this to National's attention." He didn't give him authority to make the commitment on behalf of the Wedersons.

I believe you also heard Mr. Lafferty testify that the decision as to whether to go ahead and draft plans was not made, could not have been made. Now, Mr. Lafferty's letter read in relevant part, "We are interested in submitting a proposal for theconstruction of" -- I paraphrase -- "the South Carolina project. The specifications and other detailed information is being sent to our office and I'll forward a copy to your office. If we employ the method that we discussed

in our office on December 20, 1972, we should be able to get this proposal out at minimum cost."

He indicates the amount of funds available -- the funds quoted as being available by the Navy, and he indicates also the submission date, which was somewhat earlier than April 6 and the proposal date stated here, February 20, that we know as the proposal date.

Mr. Gleason responds to that letter, January 29; and what did Mr. Gleason know about these South Carolina projects. This one says document had not been submitted to Mr. Gleason. The only thing he knew was what Mr. Lafferty's letter stated. It stated it was a 200-family housing unit in Charleston, and that the funds available were $3,000,904. That's all the details Mr. Gleason had. Mr. Gleason's letter reads: "In answer to your letter of January 23 concerning" -- paraphrasing again -- "the South Carolina project, National looks forward to the opportunity of submitting a proposal." This is what the plaintiff contends established a binding commitment on National's part not to investigage, not to see if a proposal would go in, but a binding commitment on National's part to put in a bid to construct the building that

Wederson would be responsible for.

His Honor will instruct you as to what a contract is, what's required. Unless there is some measure of intent of a meeting of the minds as to what's involved, it is ridiculous to speak of a commitment being made.

What is the next item that the plaintiff refers to as establishing this binding commitment? We know that the pre-proposal conference was held on the 20; we know that no one from Wederson attended; there was no discussion later discussing the property. The next thing is the February 26th meeting at Wederson's office which Mr. Gleason attended, along with his people, to bring the Wedersons up to date as to what had transpired at the conference.

Now, I'm sure you will recall that Mr. Voorneveld testified that at that conference Mr. Gleason agreed that National and the Wedersons were to work together on the preparation and submission of a proposal.

I call your attention to the careful way that the commitment that National is supposed to have made is phrased in this case. A commitment, as I understand, I think you understand it, is that National was to put in a proposal if Wederson started to work,

but none of the Wedersons' witnesses has stated as such. They say there was an agreement that the parties would work together on the drafting and the submission of the proposal. Well, there is no doubt that the parties did in fact work together, did in fact investigate, work quite hard to put in a proposal, but there has not been one item, one statement on that stand from a National or a Wederson witness to the effect that National definitely said, if you fellows start to work, we'll put in a proposal.

Now you heard me ask Mr. Voorneveld what was said, what did Mr. Gleason say to you; Mr. Voorneveld said, "I don't recall exactly, but it was understood." You heard all of the other Wederson witnesses talk about the commitment as being a commitment, an agreement to work together on the preparation and the submission of a proposal.

I suggest to you that those words are carefully chosen, are carefully chosen to ride in on the back of what we know to have been the facts in this case; indeed that the parties did work together.

Now, what Mr. Voorneveld's testimony, if accepted, indicates at most is that he was working under that strained interpretation of language. It

certainly doesn't indicate -- nothing in the words that Mr. Voorneveld has used -- that would convey to any third party, reasonable third party, that that sort of commitment was being demanded; nothing.

Now, I think though consideration should be given whether Mr. Voorneveld really had such an understanding. Mr. Voorneveld was the witness who looked at Exhibit 11, the plans that were testified were sent to National on the 30th; and then he looked at Exhibit 16, the plans that were sent out on April 5, and he says only minor differences.

You are going to have those plans in front of you if you want to consider them. You heard testimony about some of the differences; razing buildings; lowering land; changing floor plans. Consider those differences. Look at them and consider them on the question of Mr. Voorneveld's reliability as a witness.

Did he really have thatunderstanding that National was going to definitely put in a proposal as long as Wederson started to work. Drafts could have been on dirty paper as long as we start to work.

We talked about a little while ago, bringing your common sense into the jury room with you, apply that to Mr. Voorneveld's contention. Now, that's

about it. If the agreement wasn't made by those two letters, at least by Mr. Gleason's response to Mr. Lafferty's letter to Mr. Voorneveld that Mr. Wederson says Mr. Voorneveld didn't have authority -- unless the contract was established by those letters, or at that conference where Mr. Gleason said, let's get this one -- we expect him to say, let's not get this one, let's just waste our time working on it -- unless the contract was made at that time, when could it have been made?

the witnesses have testified they would not have started to work on the project unless they had such an understanding, and indeed they started to work directly after the February 26 meeting; by March 6 they have preliminary plans, so I think you have to be the judge. I think that you could discount any evidence after February 26 or shortly after February 26, in determining when this contract was made.

Now, what does the other evidence show? We have heard testimony about the fact that the parties worked together on other projects in the past, and that they worked together in connection with this [illegible] after February 26. Well, let's start with their first

endeavor and let's see what that indicates as far as this claim that National made a commitment. Plaintiff's Exhibit 1 is a contract dated March 29, 1971, that testimony of plaintiff witnesses indicated that -- evidences somehow a commitment on National's part in connection with this project, the New Jersey project, to put in a proposal, and indeed, that, ofcourse, that course of conduct was followed here that it's indicative of what the intent of the parties was.

I think the best place to start is with the contract itself. The contract if you look at it is divided into anumber of phases.

Paragraph 3 is labeled under a and b, set forth the obligations of Wederson and National respectively.

Paragraph 6 refers to a bid phase; and paragraph 7 refers to a construction phase; construction phase contemplates what is to happen in the event a contract is awarded by the New Jersey Educational Facility Authority.

Now, you understand the design phase, the drafting of the proposal. It's stated that Wederson has the obligation to design and engineer all structures and auxiliary plumbing et cetera in accordance with the specifications of the -- again, New Jersey Educational

Facility Authority -- shall produce working drawings and other items. You could read it if you like.

(b) National has the obligation to provide architectural and engineering design assistance, they are to work with Wederson drafting these preliminary plans.

Then we got over to the bid phase, and there are two items, the bid bond under item a and submission of a bid under item b. I would like to read those in total for you.

"Bid phase, (a), bid bond: National provided the required bid bond on any proposal on which Wederson and National agreed that National should bid. The cost of the bond shall be included as part of National's direct construction expense."

There is to come a time when a decision is to be made as to whether National should bid, and at that time the decision is to be made -- submission of bid -- again almost the same language.

"National will submit a bid in an amount computedin accordance with Paragraph 5 of this agreement on any proposal on which Wederson and National agreed that National should bid." Et cetera, and that's the end of item b. That's the bid phase, an agreement.

The contract clearly provides for various phases, and certainly a decision being made after Phase 1, to go through to Phase 2 and Phase 3 only coming in to affect, only in the event successful contract is awarded. There are some other items of the contract. I think they are still interesting and very relevant.

Item 4, under the design phase reads: "Each of the parties hereto shall perform the obligations specified in Paragraph 3 -- design phase of this agreement at its own expense."

They knew that they weren't going to get any unless a successful proposal went in. It only made sense if both parties were working quite hard. Nobody got a penny unless a successful proposal went on. That's what spurred them on, not ridiculous commitments months in advance. If you start to work on a proposal we'll put in a bid. Wederson would work hard because if they didn't a contract would not be awarded, and they wouldn't get any; National would work hard -- I think if a proposal didn't go in, it wasn't successful, they wouldn't get paid.

Item 4 is very short. "Each of the parties shall have performed the obligation of this specified

paragraph 3 at its own expense." It doesn't say if we can't agree to submit a bid Wederson or National can go to Court and get its expenses; let alone the profit that it would have received if a successful proposal had been submitted.

Now, Mr. Wederson testified about this contract, and his direct testimony didn't refer to those items. He referred to Items 11 and 9. Item 9 refers to the term and cancellation. In part it says, "Either party may cancel upon written notice to another in the event of a breach of agreement or (2) at any time it may be agreed that the contract may be terminated; and (3) as of December 31, 1975" -- now what does that mean? The contract was for projects coming out of the New Jersey Educational Facility Authority. With respect to any project coming out of that authority they were bound together.

If National wasn't to put in a bid, it had to do it on the basis of plans submitted by Wederson for this Authority, only this Authority; that's what the cancellation clause relates to. As long as the contract is in effect, National can't goout on its own and go after projects from the Authority.

Mr. Wederson referred to the fact that discussion

was given to 9 and 11. Well, 11 is labeled reservation, and it reads, "National Homes Construction is a wholly owned subsidiary of National Homes Association; National Homes subsidiary shall have the right to bid on projects by the New Jersey Educational Facility Authority as materials supplied to the third parties on plans and specifications submitted by other architectural firms.

However, National Homes will not go in to any bid or construct any homes for the New Jersey Educational Facility Authority during the term of this agreement."

What they were trying to do there was to make sure -- you read it, see what the language says -- they were to make sure that they were bound together.

Now, there were other areas. There is what was referred to as the London project. The testimony indicated that the New London project was hardly a project at all. The parties just brought -- it was brought to Wederson's attention by National -- let's consider it, hold it a week -- later, we are not interested. What is the evidence? Absolutely nothing, except to the extent maybe you can glean something from the language used.

I asked Mr. Wederson on the stand, "Did you ever use the term shooting crap?" He said, "I used it in describing a call that Mr. Woolery made to me." This is Mr. Wederson's memo, a conversation, a call with Mr. Woolery, "I returned call of Mr. James Woolery who called here on June 11 and left message he wanted to speak with me about playing poker with us on a new project." Indicates that they will speak again -- the last paragraph reads, "I'll read the criteria and get back and discuss with him possible J.B. proposal. It will be a gamble." That's the term of these turnkey operations. They were gambles. You paid your money, you took your chances. Mr. Wederson said, "Shooting crap."

What about the other project, the Warminister project? What does the testimony and evidence show about that? It shows they put in a proposal. Was there any testimony about a commitment being made by National or being asked for by Wederson, if they started to work on a proposal that National would definitely submit a proposal; no. One thing I do believe, the evidence concerning the Warminister project shows, and that is how late the submission in the case of the South Carolina project was.

Two exhibits, Exhibit C -- Defendant's Exhibit C, letter dated February 8, that includes 8 sets of submission drawings for the Warminister project; letter of February 8, submission date referred to in the letter, February 18. The plans were ready in final form 10 days prior to this submission.

MR. Lafferty's letter is dated -- excuse me -- April 4th for submission on April 6th.

Plaintiff also point to evidence that the conduct subsequent to the February 26th meeting evidences the contract. Well, it's true that conduct subsequent can indicate whether the parties are proceeding under the contract, but does it indicate that. It's conceded that the parties were working together, trying to get a proposal; no one disputes that. What piece of evidence is inconsistent with that conceded fact? What piece of evidence? What piece of evidence shows more than that? I can't think of a single piece after the alleged commitment by Mr. Gleason.

Every bit of evidence that the plaintiff put in is consistent with, they are working together, and doesn't indicate a thing more.

There was Floyd Payne, Mr. Lafferty indicated pressuring him for plans. There was Mike Noker,

down in South Carolina trudging through swamps. A very relevant question might be at this point, well, if defendant didn't make such a commitment, why would the plaintiff start to work on these plans? That's their contention. If they hadn't been made, they wouldn't have worked.

The reason is that they stood to make a tremendous profit if a proposal went in and was successful, $250,000. Now, I asked Mr. Wederson, what were your expenses? I don't know. I don't do it that way. I didn't consider it. He indicated in his testimony that I had asked him to submit the amount of their expenses, and he indicated to me that Defendant's Exhibit B, which you will be able to look at, was one of the items submitted, and it's the only item that has a dollar value as to any expense or cost that was incurred, and it lists a number of employees.

Towards the right there is a column, year hours; and there is another column amount, and the total under the -- I'm sorry, I read that wrong -- year to date, and under the column of that major column, year to date, under one column they had hours, the total is 755, and under the amount, 6,556. That's the only piece of evidence that we have putting any dollar value

on any expenses that the Wedersons incurred. I asked him. They don't think that way. That's one tremendous profit. One tremendous profit.

You will have the plans in front of you. Take a look at them, and they are hard, the draft. It's hard to put up that sort of structure too. That would have been defendant's obligation. Then a period of over a month, these plans were drafter, $250,000, that's the incentive, not any sort of ridiculous commitment from the defendant.

There is serious dispute as to when the final plans were actually submitted. You will have the pleadings in front of you --

MR. MORRISON: I object to that, the jury doesn't take pleadings into the jury room. If Mr. Simmons wants to read from them that's one thing, but they are not in the record.

MR. SIMMONS: Your Honor, I asked during our case for the admission of the complaint as an exhibit, and my understanding of the Court ruling was that it would be part of the file, and that indeed it would be in front of the jury.

THE COURT: It's part of the Court file, but whether it's admissible is another question. I say

normally we don't have the pleadings put into evidence. You had substantial information other wise in your summation and in the exhibits what you presented to the Court.

MR.SIMMONS: The last witness was Mr. Voorneveld, and I asked Mr. Voorneveld, what were the plans, the final plans, the ones that were to be submitted? Were they Exhibit 16, the ones that came with Mr. Lafferty's letter of April 4th, sent out on April 5th, or were the final plans Exhibit 11, and Mr. Voorneveld said, Exhibit 16. Those are the plans that arrived on April 5th.

Now, when did they arrive April 5th? The plaintiffs have put into evidence, some notes that were made on a manila folder by Mr. Laverty from New York to Minneapolis, he prepared these notes. The testimony was in connection with sending the other bid documents to Mr. Laverty -- excuse me, to Mr. Dooley (phonetically), he indicated there was a flight in the morning and a flight in the afternoon. The flight in the afternoon, according tohis notes, is Flight 463, leaving at 1:35 and arrives in Indianapolis at 3:29. Mr. Laverty's letter, April 4, annexed is a receipt. If you look at it, it indicates that the

plans went out on the 5th on Flight 463, they would have arrived in Indianapolis, final plans, 3:29 in the afternoon, 1 day before the submission.

You have heard mention of some answers the defendant submitted to interrogatories; the answers indicated that the plans had not arrived -- that the decision was made on or about April 2, not to submit a proposal, and you heard some reference to an afficavit to the effect that the plans had not arrived on April 2.

WEll, Mr. Gleason said he didn't use them on April 2. The affidavit, I believe the testimony was prepared without Mr. Gleason's aid.

MR. MORRISON: I object to that.

MR. SIMMONS: Your Honor, I believe there was testimony from Mr. Gleason himself that he did not supply any information in connection with the answers.

THE COURT: You could refer to testimony.

MR. SIMMONS: That's what I am doing.

You heard the testimony, you know if I'm right or if I am wrong.

You heard Mr. Gleason's testimony, April 2 he reviewed them. Mr. Gleason and Mr. Boker are really the only two disinterested witnesses in this case.

All plaintiff witnesses were either partners or employees of the plaintiff.

The other witnesses are employees of the defendant.

You heard Mr. Gleason also testify that he left National with hard feelings and since leaving he hasn't spoken to anyone from National until I asked him to come to testify. I think in terms of assessing credibility, you heard his testimony that the plaintiff wanted him to come and testify in this case. I think from Mr. Gleason's testimony, he's obviously knowledgeable about plans, about turnkey projects, he had nothing to gain. He's not going to advance his position at National, he's left; accepting Mr. Voorneveld's testimony that the 8 plans submitted with Mr. Laverty's letter, the final plans in this case; were they timely?

Mr. Laverty admits Mr. Payne indicated 6, 8 days. The testimony under cross-examination was that was a minimum.

Now, what are final plans? Mr. Voorneveld testified, identified the plans and equipment which were, he said, the 16, but what are final plans? They are plans, according to Mr. Gleason that are not revised thereafter. Why not; because the proposal, the commitment, the subcontractors have to be based

on something. They have to be based on something that they knew they could do and that's the final set of plans to go in.

Mr. Voorneveld testified, well, the ones that were submitted with Mr. Laverty's letter of March 30, were final, there were minor changes. Again, look at those changes. He indicated that the first sheet on which revisions were made was a sheet number 5. Look at the earlier sheets, you see parking lot. Not the one or two parking lots that he referred to later on, but several parking lots, at least two on that sheet; catch basins were added; streets were razed, lowered.

Now, you have heard testimony of what was to be done with final plans, and you'll have to decide whether plans that were revised to the extent of Exhibit 11 can be plans. You'll have to decide that. You'll have them in front of you; you've heard the testimony about them.

What about the actions of the defendant in the last few days, what were we doing? I think the testimony indicates that we were making every effort that we could to put in a proposal, well, not that we were bound to do so, not that we made a contract with the plaintiff, but putting in successful proposals was

National's business, that's why it was working hard. It had Mr. Dooley obtain the bid documents, getting the documents lined up to see if we could get a proposal in so we could be ready. There was Mike Boker again, in the swamps trying to line up contractors. Now, Mr. Boker left to go to South Carolina on the 1st, 1st of April, and he testified that he didn't even have Exhibit 11. Why didn't he have it? The testimony here by Mr. Laverty is that he sent them, he had been asked by Mr. Payne to send final plans.

He spoke with Mr. Dooley and said, the package is on its way. Mr. Dooley had asked for bid documents. Mr. Dooley hadn't asked for plans. Then he said, I took the letter and the bid documents and I inserted them in the plans, sent them off. What happened to the plans between March 30 and April 2 -- but if they were misdirected, whose fault was it? Didn't tell Mr. Payne, your plans are on the way. Maybe Mr. Laverty was pressured, I don't know; maybe he was busy, but I think the testimony indicates that the defendant did all that he could do, all that he could do, and the reason itdid it was because it was his business to, not because of any commitment; and the reason a proposal didn't go in was because it didn't

arrive on time.

His Honor will instruct you as to the law, as to how damages are measured. They are not pulled out of the ear. They have to be definite and not speculative, and I think on the evidence in this case you will conclude that the only verdict that can be returned is a verdict for the defendant.

I think you very much for your attention.

(Continued next page.)

MR. MORRISON: Let me begin by thanking you for your consideration and attention in this case. I'm sure at times with all the shenanigans you felt that this was going on much too long and we dragging things out, and I can appreciate those feelings.

On the other hand, these cases are important to lawyers, they are important to our clients and we do appreciate your attendance throughout the trial.

I hope in weighing the evidence that is before you and making your judgment, that you will do basically one simple fact, look at the simple, straightforward honest-to-goodness evidence that we gave you, I think if you do that there will be no doubt in your mind. I know that there is one issue that you're all asking yourselves and that question is, why didn't National submit a bid; for Heaven's sake, what happened, why didn't they submit it?

I suggest to you, ladies and gentlemen, if National had that answer, if they had a justifiable excuse you would have heard about it. If they had evidence it would be before you; if they had people who could tell you about it, they would be here, butyou haven't heard that. What you have heard is one retreat after another in an effort to find something to

hang on to. For example, before they started putting on their case, their position was simply this, that they never got the final plans from us; and I read to you from their interrogatories, which is given under oath and signed by the vice president of the company and submitted to me by Mr. Simmons. I read to you from Mr. Simmons' own affidavit, and you yourself heard Mr. Simmons in his opening remarks say to you that they will prove they never got those plans on March 30. That is what they said; that was their defense before the evidence started coming in.

What happened after the evidence started coming in? They backed off of that, and the reason they backed off was because their own witness, Mr. John Gleason admitted that he had those plans, he had them on April 2nd. What they said in their opening remarks, what Mr. Simmons said in his affidavit and what they said in the interrogatory answers, under oath, is gone, its dead. That defense is dead.

I say to you if you cannot believe what Mr. Simmons tells you in an affidavit or in an opening statement, how can you possibly believe what his witnesses tell you.

Let's pursue for just a moment this question

of why National didn't submit a bid. Did they have some legitimate reason that would excuse them from performing their obligation under the contract, or is it something that is inexcusable? Well, their whole defense was based upon a 2-prong argument.

The argument was this: They say Mr. Payne called Mr. Laverty and told him, we have to have these plans at least 6 days before the deadline. They started with that. You notice I read to you from Mr. Payne's affidavit, and he said in his affidavit, they really needed 8 to 10 days, but I only told them 6 to 8 days.

You also heard Mr. Laverty say nothing was said about 8 days, what was said was 6 days. He said they needed 6 days before bidding deadline. And the best evidence of that is Mr. Laverty's own memorandum that he made on March 30 when he sent the plans, and he says this will give National Homes the 6 days they they needed to complete their final -- not 8 days, 6 days. He didn't make it because he thought we were going to have a lawsuit. This iswhat they were told at that time and he recorded that in this memorandum.

Anyway, that's the first prong in their defense. They have to have them 6 days, namely

March 30th.

The second prong was going to be Mr. Dooley. Mr. Dooley was going to say as Mr. Simmons told you, "I didn't get these plans on March 30th, I just didn't get them and we didn't get anything until these final plans arrived on April 5."

As we all know, that's the day before bidding deadline. Obviously, if they didn't get any plans before the 5th it would be too late, and we wouldn't be here in Court today, but that's not what happened. What happened was that they got these plans on March 30th exactly as Mr. Laverty said in his letter and in his testimony to you, and they know that, and they kind of retreat from that position, but before we go their retreat, I just want to tie down this point, it's terribly important. The point is, they said before this trial started we are going to prove that they didn't have the plans on the 30th; and we can prove that we did have them on the 30th, and I told you in my opening statement there will be 4 things that we would offer you to show beyond a reasonable doubt that they had these plans on the 30th.

First was Mr. Laverty's testimony. Mr. Laverty, he took the stand, raised his right hand, testified

under oath. He remembered this. He remembered what happened. He had this conversation, this was his project as Mr. Gleason said, Laverty was ramrod. He remembers what happens. He knew he had to get these things out by the 30th, so what did he do? He had the things out being reproduced, part was out March 29th, the balance March 30th. They came in to the packaging room in Wederson's office, which is right across from Mr. Laverty's room. He went over there, said we have to put these contract documents in with the plans, and he helped him physically roll them up and he got in his car and went out to the railroad -- this is Mr. Laverty's testimony.

He remembers this. He knows what he took to the railroad. He knows whether he took it to the airport, a package this size (indicating) or a package this size (indicating), and it's preposterous for them to suggest that Mr. Laverty doesn't know what he's talking about, but that's only one thing. You have to prove this very critical point in this case. You have at least three other pieces of evidence which verified that. For example, you have the TWA receipt that Mr. Laverty got on March 30th. Here it is (indicating). It's annexed to his letter, and it's

a receipt signed by TWA that this thing was put on Flight 463. Does TWA make out phony receipts just to help lawsuits two years from now; of course not. What else do we have. We have Mr. Laverty's memorandum, he made a contemporaneous memorandum, he didn't make this because he thought we would have a lawsuit in two years from now. He said in plain language, March 30, 1973.

Today I put the final plans ona plane and sent them to National's office. I called earlier and told MR. Dooley that the plans would go on the above day, and he said that he would have someone there to pick up the plans. I later called to confirm that the plans were on the way (the above is referring to Navy Contract). This would give them 6 days to -- what does Mr. Simmons suggest? Hesuggests it's Laverty's fault because Mr. Dooley didn't go out to the airport and get the plans, or Mr. Dooley was surprised, he didn't know what he got.

This is Mr. Dooley, he was in charge of the Warminister project, he's been with National Homes for years, he knows what plans are. Would they have you think that Mr. Dooley does not know the difference between documents and plans, and somehow he got this

package and didn't know what he was looking at? That's preposterous. They were sent to Mr. Dooley as Mr. Laverty said.

Now, the fourth thing that corroborates that this in fact happened, that no one complained -- don't you think, ladies and gentlemen, if these parties were working together to put together this package, as we know they were, don't you think if they were pressuring Laverty to get these plans to them, and they didn't send them, they would call and say, "Hey, where are the plans?" Are there any phone calls of that nature? Has anyone taken the stand and said, " I called Mr. Laverty on April 2nd and said where are the plans?"

There is no evidence of that nature; nobody called Mr. Laverty and said we didn't get the plans. The reason they didn't call is they got those plans on March 30th in Indianapolis; and, of course, added to these four things which I told you that we would prove, added to these is a bonus even which I didn't know about, and that's Mr. Gleason's testimony.

Mr. Gleason walks to the stand and what does he say, he says he's having a phone call with Mr. Voorneveld on April 2nd, and what he's doing while he's

having a phone call, he has these plans in front of him, sitting on his desk, the March 30 plans were there. How did they get there? Did these plans just jump up and hop in the mail over the weekend? They were there because they were sent by Mr. Laverty on Friday, March 30th.

I submit to you, ladies and gentlemen, this is the defense that you were told they were going to present; this defense has collapsed from its own lack of merit and it's a dead horse.

What else did they say why they didn't submit a bid? That's the primary reason they offered. When I served the interrogatories and asked why they didn't submit a bid, they came up with two other things. The first thing they said, soil conditions at the project; and here we hear Mr. Simmons telling us about poor Mr. Boker who was trudging through swamps in South Carolina. This is the same Mr.Boker who out of the goodness of his heart, interest of justice took off from his new company. He's coming here, he has no expectation of being compensated.

I submit to you when National reviews his consulting agreement for this month, he'll be adequately compensated for his time; and for Mr.

Boker to suggest to the contrary is just not correct. What about the swamps? Was this some great big surprise to somebody? Is this something they didn't know about? You recall that one of the first things that happened on this project, was that we sent to the defendant the plans and specifications issued by the Navy. These were sent back in February. In fact, I believe the letter is February 7, that Mr. Laverty sent these; February 7, 1973, two months before the bidding deadline; and one of the things in those stats were these drawings. I don't think youreally want to look at them. I can't make them out, but these are drawings that tell you everything you want to know about the soil in South Carolina.

They knew this from the day someone looked at these borings and considered any problem about that soil condition. And, of course, that's not the only occasion that they had to look at this. You remember National sent three people to the proposal conference six weeks before the bidding. Mr. Payne sent a letter -- the site is heavily wooded, some areas will have to be undercut and retill the soil, conditions are smudgy; as is typical of the Southeastern region.

Mr. Boker seemed surprised that he ran into

swamps. He was down there about three weeks earlier, he could have found out all about the swamp conditions. There was only one other thing that Mr. Boker identified about the soil, he tried to say -- I wrote down what he said. He said, we couldn't tell from the plans that Wederson had submitted, what the compaction would be. He couldn't tell from the plans because that's in the specs. They are in the specifications. I gave those to Mr. Boker on cross-examination and he pointed out how right in the specs it shows, the percentage compaction required; so again, that's no surprise. And just beyond that, the whole subject of compaction has to do with dirt. If you have land fill you have to have a certain amount of density, that's not an architectural problem, that's a contractual problem. He brings in enough dirt until he has a comparative compaction degree; architects don't tell contractors how to do that; and to suggest that's Wederson's fault is preposterous.

(Continued next page.)

Are there any other reasons why they didn't submit a bid? Well, there was one other thing that they identified the these interrogatories that they filed. They said, inability to get bids from sub-contractors for necessary land improvement work. Have you heard any testimony about that, inability to get bids for land improvement work, other than this swamp problem we talked about and compaction? The only other word relating to land was that the plans that Mr. Boker was working with didn't have the planting with the shrubbery. Of course not; those were the preliminary plans, they wouldn't have that. The plans sent on March 30th have them. You'll have them in the jury room. Look at pages 10 through 12, that's where the landscaping is supposed to be, and it's shown right on those plans exactly what kind of trees go in; what kind of shrubs go in and where they are to be located.

So again, a phony issue that defendant tried to raise, just does not bear any weight.

Now, this problem about the shrubbery and plantings raises one of the most interesting questions in the case. Mr. Boker didn't know about the shrubs, he didn't about the plantings and the reason he didn't

know, he was down there with these early plans that were sent on March 6. Why didn't he have the final plans that were sent on March 30th? As I said before, the evidence is clear, those plans came in on March 30th, which was a Friday; or April 1st, which was a Sunday, Mr. Boker indicates an airplane, and went down to South Carolina.

On April 2nd, the Monday, Mr. Gleason was looking at these plans in his office. In the meantime, here's Mr. Boker trudging through swamps as Mr. Simmons says without the plans. Whyon earth is he doing that? He's going down to get the final subcontractor prices and he doesn't have the plans with him? This is our fault, this is Wederson's fault. We are supposed to call Mr. Boker and say, make sure you get the plans before you go there; that's preposterous.

I suggest to you, the real reason that bid was not submitted is because somebody at National dropped the ball; somebody didn't take those plans that came on that plane and give it to Mr. Boker. I don't know who that somebody is, maybe it was Mr. Dooley, maybe it was Mr. Gleason or someone else, but the fact is clear those plans were there, all they had to do was give them to Mr. Boker and he could have gotten the

prices he needed. Why didn't they do it, that's something we'll never know. Was there a motive? Did they have a reason to drop the ball on this? I don't know what that reason would be. I would say this, Mr. Gleason's testimony, he did admit that they were terribly busy on numerous projects. They had a name in the construction and business phase, maybe they were too busy; maybe they didn't want to be bothered or they forgot about it; or maybe they found out that one of the bidders was going to be Jewel; maybe they thought Jewel had that project they would likely win this one and they wouldn't win that bid. That's speculation.

We don't know, but we do know that they didn't do what they could have easily done to put in a bid, and that was to give Boker the plans and let him take them to South Carolina and show them to his sub-contractors.

Now, there is a second unanswered question here which also bears somment in addition to the question of what happened. Why did they drop the ball? There is another interesting question, and that question is, what happened between March 6 and April 2? What on earth was National doing all this time? You heard

the evidence from our people, they were working on these plans. We gave them preliminary plans on March 6th. Did National do anything from March 6 to April 2, apparently not. Now, they would have you believe that the reason they didn't do anything was because these plans were somehow preliminary, they were inadequate, they didn't have enough to do with -- again, that's not what the evidence says.

I read to you from Plaintiff's Exhibit 10, which is the memorandum made of the meeting on March 6, when those plans were given to defendant. What does this memorandum say? The purpose of this meeting was to review schematic designs for the project, including the site plan and individual house plans. If you look at the plans, those two plans are the bulk of the project, the house and site plans, that's the bulk of any project -- it goes on to say the following comments were made, Mr. Payne generally approved of our site plan and requested us to combine units -- Mr. Payne didn't think these plans were inadequate. He said those were good plans and he took them back to Lafayette with him; so that the real question is, why didn't they do something with them?

Mr. Boker didn't go to South Carolina until

April 2nd, and he had these plans from March 6th; is that our fault? Mr. Gleason, you will recall, also tried to pass some aspersions on these plans. He tried to suggest that they were inadequate, they didn't meet National's standards. He said Payne brought them back; Gleason never saw them. He said he never saw what was in those plans.

And, of course, the most important thing is if those plans are so bad, why not tell you, why not give you the hard concrete facts. Mr. Payne, he brought these plans back. He reviewed them on March 6 and said they were insufficient. He was doing the takeoff on these plans. You heard Mr. Gleason say Mr. Payne he was in that hotel on Park Avenue with Mr. Boker and Mr. Gleason. Have you seen Mr. Payne take the stand to tell you that these plans --

MR. SIMMONS: Your Honor, there is no basis for a comment like that on failure of a defendant to call a particular witness. There is no obligation --

THE COURT: That's argument.

MR. MORRISON: Some of you told me you sat on criminal cases last week, one of the things the judge told you in a criminal case a defendant has a right not to testify, if he doesn't testify that cannot be used against him. I'm sure we all know this

is not true in a civil case. If you have evidence and you don't present it then the jury can draw whatever inferences they want to draw. I say to you if there was something wrong with those plans that were given to them on March 6th, Mr. Payne would be here to tell you about it. He might even bring the plans in.

Where are the plans? Mr. Voorneveld explained why we can't show you the plans. We can't physically prove to you that those plans were sufficient. They don't exist any more. You have to understand how these things work.

Tracings are made, as Mr. Voorneveld said on a transparent lucite page, and how you get these things, you reproduce them and they come out like blueprints, but the minute you start changing the original to bring it up to date, to revise it to work on it, you don't have an original any more -- but National had it, Mr. Boker had it, he took it to South Carolina. If these plans were so bad you could bet Mr. Boker would have gone through them showing you the inadequacies on them.

WEll, is there anything that they have done to try to explain why they didn't put in a bid? I

suggest there is only one thing that they have tried to do and that's pathetic, an 11th hour attempt to try and pass doubt on those plans; and how did they do that? Mr. Gleason, Mr. Boker, Mr. Payne, and at least two or three lawyers closed themselves in a hotel on Park Avenue Tuesday night and they took out the plans and went through them and they spent hours trying to find little things that they could find was wrong with them.

Did they do that on April 2nd? They didn't even look at them on April 2nd. They didn't look at them on April 5th, and I submit, if National spend half the time back in April as they spent the other night on Park Avenue, they could have put in a bid on this project. They did not spend the time.

The only other really significant issue in this case, other than the one we have been talking about is the original question of, was there an agreement? Was there an agreement between Wederson and National Homes to proceed on this project? Let's look at what we heard from them. What we have heard basically is the testimony of Mr. Gleason that in his secret heart of hearts they never intended to have an agreement of this nature, and that no contractor would ever do this and

never in their wildest imagination, would they allow them to go forward with the bid prior to the date the bid was to go through. I suggest, if that's true, that that was their intention, it's the best secret since Pearl Harbor. Have you heard anybody in this courtroom testify that that was the understanding that they communicated this to Wederson.

Now, Mr. Simmons turned things around in his closing statement. He said to you that we contend that the agreement -- that if we started to work on the plans they were bound to put in a bid. That's not our contention. I never told you that and neither did any of our witnesses. What we said, there was an agreement that we would do the plans, we would give them to National and they would put in the bid.

Obviously, if we started working and stopped two days later, they're not obliged to put in a bid, we wouldn't be here suing for breach of contract. It's another example of a phony belated 11th hour attempt to create confusion on these very simple issues.

Now, that's what they said, that's their evidence. Mr. Gleason's testimony that he never intended this, and that nobody at National Homes intended that, that's all that they offered. What did we offer?

Again, I told you in my opening there were 4 items we could look at to confirm that there was in fact an agreement.

The first thing was the exchange of correspondence in January of 1969. Mr. Laverty wrote to Mr. Gleason and Mr. Gleason wrote back, signed the letter and he admitted this was his letter. And what does he say? Does he say that National looks forward to thinking about whether they would bid? That's not what he says. He says National looks forward to the opportunity of submitting a proposal along with Frederick Wederson on this project.

That's about as clear as the English language can be as to what they intended. Well, they say, we couldn't possibly bring -- intend anything at this stage, it's too early, you have to wait to see what happens at the pre-proposal conference. Obviously, if they went to South Carolina and discovered that there was some unsolvable problem, the parties were free not to go ahead. There is no mystery about that. They could have come back and said, there was 12 feet of granite under the land, we can't build here, but nobody said that. They came back from that conference and theymet in New York and they had a whole team of

people there; National had at least three people there, and I think probably four or five, if I remember Mr. Gleason's testimony. Wederson had a team of people there, and they talked about what they were going to do to go ahead and Mr. Voorneveld said, the sum and substance of their conversation was tha t they would proceed on the project; Wederson drew the plans and National put in the bid. There was no dispute about that, and Mr. Voorneveld testified the conversation ended by John Gleason saying, let's go get this one now. They said don't believe a thing Mr. Voorneveld says, he's lying, not to be trusted.

Anything he said was corroborated by Mr. Gleason. He admitted that he was there; he admitted this was to work out the details of going forward, and he admitted that he said at the end of the meeting, let's go get this one; and, I submit to you, that let's go get this one means let's go get this one.

It doesn't mean you, Wederson, go do all the work and we'll talk to you two months from now, and tell you whether or not we are going to put in abid, that's not what that means. It means Wederson, you do your job, we'll do our job and we hope it works successfully.

There's a third thing that confirms the existence of this agreement and that's the conduct of the parties. Now, I'm sure you all realize there are different kinds of contracts, one kind is a formal kind that lawyers draw up and it's 30 pages long and we charge outrageous fees, that's one kind of contract; I can agree that you are going to sell me your car, that's a contract. The conduct of the parties indicate a contract, and as I said in my opening, the contract of the parties subsequent to February 26, both sides admitted they understood they had a contract.

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Mr. Morrison: (continuing) We were drawing plans we would submit to them; we had meetings. Everyone understood they had a contract, that's why they were going forward. I make passing reference to various things that happened toward the end of the month; we had all these phone calls, Mr. Laverty was calling about getting the plans there; Mr. Voorneveld called to tell him about the fee; Mr. Laverty spoke about signing a contract number; nobody said during those telephone calls, gee, we don't have a contract, we haven't decided yet. They knew they had a contract and that's why they were having all these contacts; the old maxim, action speaks louder than words.

Both parties said that Mr. Gleason had a secret that he hadn't decided yet. There is a fourth interesting piece of evidence, which again confirms the existence of this contract, and that's what happened on the New London project. Now, that is a very important sequence of events, it's important for a number of reasons. Number one, who was involved? Was it Gleason, Payne, Boker; no. It was the vice-president of the company, James Woolery. Do you remember who Mr. Woolery was, he's the one who negotiated this formal contract. Mr. Simmons spent

a lot of time on this formal contract. Mr. Wooley is the one who negotiated it, and this is his name down here, James C. Woolery, executive vice-president. He knew about this contract. He knew what the intention was and what happened, and he called Norman Wederson, it was about eight weeks before the bidding contract, he said there is this project in New London, Connecticut, and would you like to play some poker with us on it and Normand Wederson said, sure, but Woolery says don't do anything yet because we have to decide whether we can really go forward on this one and they have a couple of phone calls, and then about three days later, Woolery calls back and he says, we think we are going to have to drop this, we don't think we could do this economically, and then the following day there is a final phone call and Mr. Norman Wederson made a memorandum up of that, and he said, I had a phone call from Mr. Woolery today, they will not bid on this project, we can drop all activity. It is dead. That was January 24, 1971. That was almost seven weeks before the bid was due to be submitted. Mr. Woolery knew what this contract was all about. He knew that if they decided to go ahead they had to decide, and they wouldn't wait for the last minute.

Now, Mr. Simmons again pointed to the contract, he said well, the way this thing is set up you have a design phase and you have a bidding phase, and these are separate paragraphs of the agreement, so big deal. They are separate paragraphs in the agreement. Under bidding phase it says, "National will submit a bid on any proposal on which Wederson and National will agree that National shall bid. Now, it doesn't say that they will submit a bid on any proposal on which they agree, the day before the bid was due, to submit a bid; that's not what it says. It says on which they agree. So this doesn't answer the question of when does that agreement have to come. How do you answer that question? You answer it by looking at what the parties actually did. How did they construe the instrument. We know how Mr. Wooley construed that agreement. He knew you had to have that agreement seven weeks before the bidding contract; the same thing in Warminister, everyone agreed to go forward on Warminister long before Wederson started the work; nobody told Wederson -- by the way, after we get your drawings we are going to take a look at them and decide whether or not we are going to go forward; nobody ever said that. The same thing on New Jersey Educational

Facility Authority, four, five projects pending in New Jersey. They decided only to go forward on two of those. Did they decide this at the last minute; absolutely not. Everybody admits that these decisions were made before Wederson decided on the drawings. That's how National's own witnesses construed that contract.

Now, those are the four factors which I said will prove, and I'm sure we have proven it to you, but there are a couple of other things that came up during the trial which I think confirmed this even more. For example, you have Mr. Gleason's testimony. He refused to say, you recall when I pressed him, he wouldn't say that they understood the bid would be submitted, but they expected the bid to be submitted. We all expected the bid to be submitted. If he expected that, what do you think Wederson expected. They expected the very same thing; and then there are Payne's depositions read. Mr. Payne said, "These deals are normally made right after the pre-proposal conference. I would meet with my superior, Mr. Gleason, and he would advise me of the corporation's decision whether or not to go ahead." Again, that's Mr. Payne's own testimony. That's how parties

understood the contract to read.

Well, what do defendants say about this? They really only say one thing. Mr. Simmons says, think of all the things that could possibly go wrong; maybe we discover granite under the ground; maybe there is a strike, they can't get sub-contractors to do the work; maybe there is a hurricane in South Carolina. That's all well and good. Say that Mr. Schwartz and I have a contract to sell him the car and we agree I'll give you the money and you turn over the title. Maybe your car gets stolen, does that mean I could sue you for breach of contract -- if something unexpected happened, National can claim that as a defense if they come to us and say we discovered solid granite under the surface, we can't build on the site. That would be an excuse, but it doesn't mean that there was never a contract in the first place. All it means is that there was a contract but something has happened to justify one of the parties from going ahead. That's all that that defense means. Mr. Simmons gave an interesting example. Under our theory if we had given them drawings for a bridge they would have an excuse for going forward on the contract.

I apologize for the length of my remarks and I'm sure you're probably wishing that we let you decide and go home, but I often thought nine out of ten cases, jurors make up their minds long before they hear from the lawyers, but lawyers think unless they comment on the evidence it's not really clear. That's why Mr. Simmons and I go through this and to the extent that I'm talking about things that you have well in mind. I do apologize. There's just one other thing I want to talk about and that is the amount of our damages in this case. First of all, keep this in mind, we admit there is no doubt about it, we admit that if they put in a bonafide bid and lost we wouldn't be here today. We understood what the arrangement was, if we bid and lost that's it. That's where the poker comes in -- which wasn't Mr. Wederson's phrase; Mr. Woolery's phrase. They cut this thing off before a bid could go in and that's why we are here today. In other words, they have breached that contract, and by breaching that contract they have no right to come back and say, well, you're not entitled to your money because under the contract you wouldn't get it unless you were the winning bidder. They forfeited the right to bid on that contract. As

the Judge will charge you under the circumstances we are entitled to the reasonable value of our services up to the time that they breached the contract; that's all we're asking for.

Now, what is that amount? How much are we asking for? Well, Mr. Wederson testified that he set the fee on this project; he set it at $250,000, but he also had one other thing as Mr. Voorneveld showed when he communicated -- this applies to Mr. Gleason. We knew that there would be some additional work that our firm would have to perform and we took that into account, that's why they jacked up the fee from five to six per cent on the previous contract, Warminister. The drawings were more detailed, we put more time and detail on it and that's one thing. The Navy said it was unnecessary. When Mr. Laverty went down there in December to talk to the Navy -- what was wrong, why we came in second not first, he said your drawings are too detailed. Some of that can be supplied later as the job goes on. Because of that we realized we would have additional work to do, and perhaps have to make trips to the site. I would submit those would have been miminal; National knows how to run these projects, but to allow for that Mr. Wederson said,

"I'll add on another one per cent, one per cent of the project that was -- deduct $42,00 from $250,000 which gives you $208,000. That's the amount of your reasonable and customary amount, the architect's fee, in a case like this. Do they take issue with that? They try to have a lot of fun -- they don't dispute the underlying facts. The underlying facts are very simple. When that fee was communicated to National Homes they didn't object. Mr. Gleason said, there has never been a time when he didn't try and talk the architects down a little bit. They didn't object to that.

Secondly, it was similar to the fee on Warminister. They accepted our fee as five per cent of the construction cost; and thirdly, we have the fact that this was the standard fee -- there is this AIA schedule that you heard about, architects have standard fees, nobody follows the same fee as the other guy, but in the industry there are, the standard fee was 5.5 per cent. That evidence has not been controverted in any way. They haven't passed any doubt on that, and besides that's Wederson's normal fee. They have been in business for fifty years, they know how to compute fees. What do we say about

Mr. Simmons' point that this is somehow a windfall, it's unfair. "It's a big joke because we getting $250,000 for this." Well, I would say a number of things, ladies and gentlemen. First of all architecture is not something you could sit down and measure your time on. It takes me this time to do this and therefore I'm entitled to this. It's a creative thing, these things aren't done mechanically, it's a creative thing. Your prior knowledge and training you can't measure that in hours. Do you think painters who paint pictures get paid for hours, they get paid for their creativity. You heard Mr. Wederson say 99 per cent of their work is done on a personal basis. They don't bid for a time basis, they keep these time records. At least at this time, they were a larger firm, they had over 100 employees. They are bigger, they have to have administrative control. Mr. Wederson and other people have got to know how much time people are wasting on projects. Are they wasting time on this project, not putting enough time on this project. In a big organization you have to, that's why they kept these time records, not for billing purposes, they don't bill for that purpose. They design schools, they charge a standard percentage for the construction

of a school, that's the way it's done in the industry. Mr. Simmons handed up this exhibit which he claims is the total hours. I don't know what it is; Mr. Wederson doesn't know what it is. It's something that came out of our accounting department. This is not the total time on this project, I'll tell you that. You recall Mr. Vansydam put in a memorandum on this showing what his time was, his total time was, 105 hours. This piece of paper, whatever it is, shows five hours. We have no obligations to prove what our time was, that's not part of our case. THat is why you didn't hear me go into this. I don't claim that we are entitled to compensation on an hourly basis. We are entitled to it on our usual customary fee. If he wants to prove something else, that's his problem, he'll have to prove it. He can't look at us and say we haven't prove our time. I don't know what this is, but it's not the time put in on this project.

Well, that's all I have ladies and gentlemen. The essence of our case is very simple. We claim we had an agreement with National Homes. We claim that they knew they had that exhibit; we performed it, we did what we were required to do and they didn't do what they were required to do, that's why we are here

in Court today.

The purpose of the jury system is to resolve disputes of this nature and that's why we come before you. You are the judges of this matter. We are not asking you for sympathy, or charity. All we are asking for is a judgment based upon the evidence and the law as the Judge will tell you and after you have weighed the evidence and weighed the documents there will be no doubt in your mind that we are entitled to a verdict in this case.

THE COURT: We will take our usual ten minute recess. Thank you.

(Continued on next page.)

CHARGE TO JURY AND OBJECTIONS

THE COURT: Members of the Jury, now that the presentation of evidence in this action has been completed, it is the function of the Court to instruct you on the law.

You are the sole judges of the facts in the case. The facts or evidence consist of the testimony of the witnesses, the facts as stipulated and the exhibits marked in evidence. Exhibits marked for identification only are not evidence.

Statements made by counsel in support of their objections in summations or otherwise are not proof, although they may be helpful to you in ascertaining the truth. Your recollection of the testimony, however, is what you should take into consideration in arriving at your verdict.

The Court made rulings in the course of the trial in admitting or excluding evidence, or otherwise. You are obligated to accept those rulings and the instructions given in this charge.

Disregard all evidence which the Court ordered stricken from the record. None of the rulings made by the Court or statements made by it are to be regarded by you as an indication of the Court's opinion of the issues and evidence in this action.

The plaintiff in this action is Frederick P. Wederson Associates; the defendant is the National Homes Construction Corporation.

The attorneys for the parties have submitted to me various requests for instructions and I will read to you some of them that I think are appropriate.

The principal issue in this case is whether there was an agreement singular to bid. The plaintiff's claim is for breach of contract. Specifically, its claims are as follows: (1) There was an agreement between the parties to prepare and submit a bid on the South Carolina project;

(2) That plaintiff performed its obligations under that agreement by delivering site and final design plans to defendant; (3) That defendant breached its obligation by failing to submit a bid; and that (4) Plaintiff was damaged by virtue of its substantial investment of time and effort in the project, which it would not have incurred had plaintiff known that the defendant National would not submit a bid.

Since defendant admits that it did not submit a bid on the South Carolina project, you need only determine whether plaintiff has established the remaining three facts; namely that there was an

agreement to prepare and submit a bid; that plaintiff performed its obligations by making timely delivery of the final plans to defendant, and that plaintiff was damaged by virtue of defendant's failure to submit a bid.

With regard to the existence of an agreement, in order to find for the plaintiff, you must find that there was an agreement between the parties whereby they would work together to prepare and submit a bid on the South Carolina project. If you find that defendant's intention was to work with plaintiff in the preparation and submission on the bid of the South Carolina project, such a finding would satisfy the requirement that plaintiff prove the existence of an agreement.

Plaintiff also claims that an agreement to work together to prepare and submit a bid on the South Carolina project is confirmed by the conduct of the defendant during the time in question, and that defendant's conduct from January 23rd through April 4th led plaintiff to believe that defendant would submit a bid on the South Carolina project and that plaintiff relied on that conduct to its detriment by doing all the work necessary to prepare final site and

architectural plans for the project.

If you find that the conduct of the defendant reasonably led plaintiff to believe that defendant would submit a bid on the South Carolina project, and that plaintiff relies on this conduct by doing all the work necessary to prepare final site and architectural plans for this project, such a finding would satisfy the requirement of plaintiff to prove the existence of an agreement. The plaintiff further asserts that the drawings which were sent to the defendant on April 5, 1973 contained only minor changes.

Defendant contends that its failure to submit a bid on the South Carolina project is justified by plaintiff's failure to submit final plans on time, by problems with the soil conditions at the project and by its inability to get bids from subcontractors for necessary land improvement work; also that those are the only matters in issue in this case regarding the existence of an excuse for the defendant's failure to submit a bid and that you should not consider any other matters in this regard.

The plaintiff further contends that the defendant attempted to introduce evidence regarding certain alleged inadequacies in the drawings prepared

by plaintiff, and that this evidence was excluded because the question of the adequacy of plaintiff's drawings is not an issue in this case.

With regard to the issue whether Wederson fully performed its obligations under the agreement, in order to find for plaintiff you must find that Wederson delivered the final drawings to defendant in sufficient time for defendant to complete the final preparation of the bid proposal. In this respect, both sides agree that defendant told Wederson that it needed the drawings six days before the bidding deadline of April 6.

As to whether Wederson was damaged on account of defendant's failure to submit a bid on the South Carolina project, in order for you to find for plaintiff you must find that Wederson expended time and effort in preparing site and architectural drawings for the South Carolina project as the result of an agreement that it would work with defendant to prepare and submit a bid on the project.

If you find that there was an agreement between plaintiff Wederson and defendant National Homes to work together to prepare and submit a bid on the South Carolina project and that Wederson performed its

part of the agreement, and that, as a result of that agreement, plaintiff Wederson expended time and effort in preparing the site and architectural plans for the South Carolina project, then plaintiff is entitled to have to its damages determined by you. Accordingly, if you find in plaintiff's favor on these issues, I instruct you that plaintiff is entitled to recover the reasonable value of its services in preparing the site and architectural plans for the South Carolina project. If you reach the question of damages, you must decide, on the basis of all the evidence, the reasonable value of plaintiff's services in preparing the site and architectural plans for the South Carolina project.

Plaintiff has presented evidence tending to show that the reasonable value of its services was two hundred and fifty thousand dollars. You may of course find the reasonable value of plaintiff's services is less than two hundred and fifty thousand dollars, and award a verdict in such lesser amount.

A corporation is liable for the acts of its officers and employees who act within the scope of their authority, and for the effects of such acts, even though other officers or employees of the corporation, including the president, may not have

intended or contemplated such effects.

Now, defendant has submitted charges, some of them that I will now relate.

Defendant contends that a decision was made not to submit a proposal because the plans drafted by plaintiff did not arrive in sufficient time to enable it to do the work that was necessary in order for a proposal to be submitted, and that, in any event, the plans which plaintiff sent to defendant were so deficient that no responsible bid could be submitted.

Defendant further contends that, while it did work with plaintiff to investigate the possibility of submitting a proposal and worked with the expectation that a proposal would be submitted and would be successful, it at no point agreed or represented to plaintiff that a proposal would in fact be submitted and that each party had the right to cease work whenever it chose so long as it did not mislead the other party.

Defendant further claims that the key factor in determining whether an agreement or promise was made is the intention of the parties. The parties are not bound unless that is their intention. That intent is gleaned from the words and actions of the

parties as understood by reasonable men of ordinary carefulness and intelligence in the circumstances. It is not necessary that a party's agreement or promise be expressed in words. It may be implied from acts. However, the acts must evidence to an ordinary man an intention to be bound.

Plaintiff contends that defendant agreed or promised that a proposal would be submitted so long as plaintiff submitted proper and timely plans to defendant for the South Carolina project. It is conceded that between late January and early April 1973 the parties worked together evaluating the possibility of submitting a proposal for the South Carolina project. Defendant contends that there was never a commitment by either party that a proposal would be submitted, although the parties proceeded with the hope and expectation that a successful proposal might be developed and submitted. Defendant contends that it did not and would not make such an agreement prior to revealing plaintiff's final plans for the South Carolina project.

You must determine on the basis of the evidence presented whether plaintiff has established that defendant's words or actions evident an agreement

or promise to submit a proposal. In this connection, defendant's hope or expectation that a proposal would or could be submitted is not in and of itself sufficient. It must be established that there was an agreement or promise by defendant or you must return a verdict in his favor.

If you find that the words or actions of defendant did in fact evidence a promise or agreement to submit a proposal, you must determine whether plaintiff submitted plans to defendant in sufficient time to enable it to do whatever was required in order that a proposal might be submitted. In the event that you find the plans were submitted to defendant in timely manner, you must next consider whether the plans submitted met the requirements of the Navy. If you fail to find either that the plans were timely submitted or that they did not meet the requirements of the Navy, you must return a verdict in favor of defendant.

This is again the defendant's request to charge.

A further necessary element of any recovery by plaintiff is damages in a certain amount. This element, too, must be proved by plaintiff by a preponderance of the evidence. In order for plaintiff to

be awarded damages, the amount of the damages must be proven to a reasonable degree of certainty. The amount of damages cannot be left to speculation or conjecture. Plaintiff contends that as a result of wrongs by defendant it incurred various costs and expenses. You must be satisfied to a reasonable degree of certainty that plaintiff did in fact incur such costs and expenses and the amount incurred before such an amount can be awarded as damages.

Defendant contends that any costs and expenses that plaintiff incurred were in connection with the preparation of a proposal and that it was at all times understood that each party was to bear its own expenses and would have no right to reimbursement from the other. If you find that it was understood that any costs that might be incurred by either party would be borne by that party and the only right to receive any amounts in connection with a proposal would be in the event that the proposal was successful and the contract awarded, then you should return a verdict in favor of defendant.

The burden or obligation is upon the plaintiff to prove by a fair preponderance of the credible or believable evidence as to the truth of his claims.

Preponderance of evidence does not necessarily mean the greater number of witnesses, but it means the quality of the testimony of the witnesses and of the other evidence.

The defendant has no duty to disprove any of the plaintiff's claims. If you find as to any of the plaintiff's claims that the plaintiff has failed to sustain its burden of proof or that the evidence is evenly balanced, then you must find for the defendant on such claim.

Neither sympathy, bias nor prejudice should enter into your deliberations and should have no part therein. Both parties stand equal before the Court and are entitled to even-handed justice.

The quality of the testimony of the particular witnesses, regardless of who calls them, rather than the quantity or number of witnesses is the test to be used in arriving at your decision. There is no presumption that the witness for the plaintiff are more or less truthful or credible than the witness for the defendant.

You are the sole judges of the credibility or believability of the witnesses and the weight to be given to their testimony. In determining this you are

entitled to take into consideration their bias, if any, their relationship to the parties, their interest in the outcome of the case, if any interest exists, their manner of testifying, their candor and frankness, and any other tests which you would ordinarily use in judging the weight to be given to the statements of persons with whom you come into contact.

It is for you, and you alone to decide which testimony you shall accept.

If you find any witness wilfully testified falsely to a material fact in the case, you may disregard his or her testimony altogether, but you are not bound to do so and you may accept such testimony as you believe to be true and reject such testimony as you believe to be false.

There can be no verdict of the jury, either for the plaintiff or for the defendant, lest such a verdict is unanimous.

If you agree upon a verdict, such verdict should be either for the plaintiff for the amount of its damages expressed in dollars or for the defendant. The exhibits will be delivered to you.

Now, I ask the counsel to approach the bench.

(Whereupon a side bar conference was had.)

THE COURT: Has the plaintiff any exceptions to the charge?

MR. MORRISON: On the amount of our damages, the amount you gave was two hundred fifty thousand dollars, we are only seeking two hundred and eight thousand dollars.

THE COURT: Anything else?

MR. MORRISON: You read from their request to charge, I don't believe that's part of the case.

THE COURT: Anything else?

MR. MORRISON: Nothing else.

THE COURT: Does the defendant have any exceptions?

MR. SIMMONS: We except to your Honor's charge that the inadequacy and sufficiency of the plans is not at issue. We also except to the charge that if the plaintiff was misled by the conduct of the defendant that would constitute an agreement.

THE COURT: I understand.

MR. SIMMONS: You read this language. You read specific language from request number three. As a matter of law for the reasons we set forth in our trial memorandum that course of action for promissory estopol does not lie in this sort of a situation.

THE COURT: I have your point.

MR. MORRISON: When you gave the instructions that were requested by the defendant, you explained to the jury that these were defendant's contentions, I think it should be made clear to the jury and the defendant request that you tell them that all of your instructions were the instructions of the Court.

THE COURT: Yes.

(Whereupon side bar conference was concluded.)

THE COURT: All of the statements that I have read on the part of the plaintiff and defendant are instructions of the Court. Then also in place of the statement of two hundred and fifty thousand dollars claimed by the plaintiff, the claim has been reduced to two hundred and eight thousand dollars. I then said something about plans timely submitted to the Navy, and that should be eliminated.

So that covers it.

Now, is the Marshal here? Swear in the Marshals.)

(Whereupon the Marshals were sworn in by the Clerk of the Court.)

THE COURT: Well, ladies and gentlemen, you will be escorted by the Marshals for lunch, and I caution you not to discuss the case at luncheon, not

until you come back to the jury room and then as to the lady alternate, I should relieve you at this time, you have been so faithful as all the jurors have, I'm going to allow you to go to the luncheon.

Members of the jury, you may now retire to the jury room in the custody of the Marshals and you will be taken to lunch and then returned to the Court.

(Whereupon Court stood in recess.)

ag/ffe
1pm/1

AFTERNOON SESSION 76

(Jury entered jury box at 3:15 p.m.)

THE COURT: I have a note from the jury, "The jury is ready."

JUROR NO. 1: Yes sir.

THE COURT: What is your verdict?

JUROR NO. 1: We decide in favor of the plaintiff, your Honor.

THE COURT: For what amount?

JUROR NO. 1: One hundred and fifty thousand dollars.

THE COURT: Is that your verdict, Juror No. 2?

JUROR NO. 2: Yes.

THE COURT: Is that your verdict, Juror No. 3?

JUROR NO. 3: Yes.

THE COURT: Is that your verdict, Juror No. 4?

JUROR NO. 4: Yes.

THE COURT: Is that your verdict, Juror No. 5?

JUROR NO. 5: Yes.

THE COURT: Is that your verdict, Juror No. 6?

JUROR NO. 6: Yes.

MR. SIMMONS: Your Honor, there is an application for judgment notwithstanding the verdict.

THE COURT: Overruled. Denied, I should say. Is that all?

MR. MORRISON: I have nothing.

MR. SIMMONS: I ask for a reduction in the amount of the award of the verdict.

THE COURT: Denied.

Members of the jury, you have been very conscientious in the performance of your duty and you receive the thanks of the Court.

You may now return to the central jury room.

THE CLERK: I think your term is finished so you can go home.

THE COURT: In any event, you may withdraw, members of the jury.

(Court adjourned for the day.)

* * *

PLAINTIFF'S EXHIBITS

EXHIBIT 2 - MEMORANDUM OF WILLIAM G. LAVERTY DATED DECEMBER 20, 1972

DECEMBER 20, 1972

MEMORANDUM

TO: NORMAN J. WIEDERSUM
FREDERIC G. WIEDERSUM
RICHARD C. WIEDERSUM
LEON J. SWINSON

RE: DEPT. OF THE NAVY - 200 FAMILY HOUSING
WARMINSTER, PENNSYLVANIA

On December 19 I met with Mr. Ralph Masino, Chief of Design and Construction, and Mr. William Van DeWorth, Sr. Design Architect, both of the Norther Division Engineering Facilities Command. The meeting was held at the U.S. Naval Base in Philadelphia at 10:00 a. m.

The purpose of the meeting was to determine the cause of our losing the Turn-Key Housing Project at Warminster. We wanted to find out if it was poor design or just dollars. Mr. Masino stated that certain information would not be available, but they would help as much as possible since they understand our dollar problems.

Both men, after looking over our plans, stated that they were much too detailed. Example: Wiring was not necessary, only spot the receptacles, light fixtures, etc. They were excellent, but too detailed. The winning bidder only submitted 4 to 5 sheets, we submitted 15. We should refer everything to the FHA Standards, which the Navy sticks very close too and not show manhole details, etc.

The review Board evaluated each proposal on a point system. The most points has the best opportunity, providing the price is reasonable. No. B-49 submitted five (5) proposals, probably different materials on facade). They ranged from 582 to 588 points. Ours, No. B-25, had 582 points. In other words, we were second out of eight (8) bidders. They take the points and divide it by the proposal price.

Example:	Submission B-49	Our Submission B-25
	$\frac{588}{\$4.6 \text{ million}} = 12.8$	$\frac{582}{\$4.8 \text{ million}} = 12.1$

This concluded that our design was okay, but the price was high.

Mr. Masino informed me that another Turn-Key Project will come out in February 1973. The proposed 200 + family housing will be in Lakehurst, New Jersey. I will write a letter of interest, to be assured of getting specs, etc. I will also send an up-dated 251 Government form.

William G. Laverty

WILLIAM G. LAVERTY
lf

EXHIBIT 3 - DEPARTMENT OF THE NAVY NOTICE OF REQUEST FOR PROPOSALS DATED JANUARY 16, 1973

PLAINTIFF'S EXHIBIT 3 [illegible]

DEPARTMENT OF THE NAVY
SOUTHERN DIVISION
NAVAL FACILITIES ENGINEERING COMMAND
2144 MELBOURNE ST., P. O. BOX 10068
CHARLESTON, S. C., 29411

16 January 1973

NOTICE OF REQUEST FOR PROPOSALS

Subject: Invitation to submit a proposal to construct 200 Family Housing Units at the Naval Weapons Station, Charleston, South Carolina (N62467-73-R-0010)

Gentlemen:

The U. S. Navy desires to procure 200 family housing units under the "turnkey" concept for occupancy by Navy enlisted personnel at the Naval Weapons Station, Charleston, South Carolina. It intends to obtain this housing by negotiation with qualified builders based on a design and cost competition. The housing will be constructed on Government land under a fixed price contract, and upon completion and acceptance, the Government will own, operate, and maintain the housing. The scope of work includes design and construction and inspection of all structures, utilities, roads, walks, and all other required site improvements, including landscaping necessary to provide a complete and ready for use total family housing facility.

This Command will send a Request for Proposal (RFP) on the subject project to those firms who, in response to this letter, indicate a desire to compete for award of this contract. The RFP will establish the design and construction criteria for this project and will provide other data to assist prospective proposers in preparing their proposal. Funds in the amount of $3,904,000.00 are available for award of a contract to the firm submitting the proposal considered to be the best in terms of quality and cost and, therefore, not necessarily to the firm submitting the lowest cost proposal. Selection of the successful proposal will be based on the following factors:

(1) Quality - Site planning; architectural attractiveness; dwelling unit design and livability; construction quality (including installed equipment); and, anticipated future maintenance and operation expense.

(2) Cost - Total contract cost to the Government for design and construction of the 200 Family Housing Units at the Naval Weapons Station, Charleston, South Carolina.

Proposals on the subject project will be received by this Command until close of business, 16 March 1973. A preproposal conference will be convened at the Southern Division, Naval Facilities Engineering Command, 2144 Melbourne Street, Charleston, South Carolina, commencing at 0900 on 14 February 1973.

Enclosure (1) has been provided for your convenience in requesting receipt of a RFP on the subject project.

Very truly yours,

J. P. JONES, JR
CDR CEC USN
Head, Acquisition Department

Encl:
(1) Reply Letter

BEST COPY AVAILABLE

1400
FGW ✓
RCW ✓
766a LJS ✓

FILE

EXHIBIT 4 - LETTER DATED JANUARY 23, 1973 FROM WILLIAM G. LAVERTY TO JOHN GLEASON

PLAINTIFF'S EXHIBIT

January 23, 1973

Mr. John Gleason
National Homes Construction Co.
P.O. Box 860
Earl Avenue
Lafayette, Indiana 47902

Dear Mr. Gleason:

We are interested in submitting a proposal along with National Homes for the construction of 200 Family Housing Units at the Naval Weapons Station, Charleston, South Carolina. The specifications and other detailed information are being sent to our office and I will forward a copy to your office.

If we employ the methods we discussed in our office on December 20, 1972, we should both be able to get this proposal out at minimum cost.

The funds available are quoted at $3,904,000.00. Hopefully, we will be able to use our last housing designs, with slight modifications.

The date for proposal submission is March 16, 1973. A preproposal conference is scheduled for February 14, 1973 in South Carolina.

Very truly yours,

William G. Laverty

WILLIAM G. LAVERTY
jcw

C

DEF. EX. 9-12-74
FOR ID.
HARVEY B. KRAMER
REPORTER

EXHIBIT 5 - LETTER DATED JANUARY 29, 1973 FROM JOHN GLEASON TO WILLIAM G. LAVERTY

File -
cc FHW - NJWA
AHV

PLAINTIFF'S EXHIBIT 5 24 Feb 33

January 29, 1973

Mr. William G. Laverty
Frederic P. Wiedersum Associates
65 Roosevelt Avenue, Box 365
Valley Stream, New York 11582

Dear Mr. Laverty:

This is in answer to your letter of January 23 concerning 200 Family Housing Units at the Navel Weapons Station, Charleston, South Carolina. National looks forward to the opportunity of submitting a proposal along with Frederic P. Wiedersum Associates on this Project.

After we have received the specifications and have had a chance to review same, I feel it advisable that our people who have been working on the Air Force Projects meet with your people to discuss the proposal in more detail. I would further propose that our architect and estimator attend the preproposal meeting, along with people from your office on February 14 only because of the many meetings they have recently attended and the fact that they might ferret out some information otherwise missed that will be helpful to you in the development of the plans.

I will await word from you as to the time and place of our meeting.

Very truly yours,

NATIONAL HOMES CONSTRUCTION CORPORATION

John Gleason
John Gleason
Vice President

JG:dmh

DEF. EX. D
FOR ID. 9-12-74
HARVEY B. KRAMER R/C
REPORTER

EXHIBIT 6 - LETTER DATED FEBRUARY 7, 1973 FROM WILLIAM G. LAVERTY TO FLOYD PYAN

FREDERIC P. WIEDERSUM ASSOCIATES
ARCHITECTS - ENGINEERS

VALLEY STREAM, NEW YORK • TOTOWA, NEW JERSEY

PLAINTIFF'S EXHIBIT
6-2-82
D-11-23

February 7, 1973

National Homes Construction Corp.
P. O. Box 860
Earl Avenue at Wallace
Lafayette, Indiana 47902

Attention: Mr. Floyd Pyan

Gentlemen:

Enclosed herewith are the plans and specifications for the proposed 200 Family Naval Housing at the Naval Weapons Station, Charleston, South Carolina as per our telephone conversation.

Very truly yours,

FREDERIC P. WIEDERSUM ASSOCIATES

William G. Laverty

WILLIAM G. LAVERTY
dmc
Enclosure

EXHIBIT 8 - MEMO DATED FEBRUARY 21, 1973 TO JOHN GLEASON FROM FLOYD PAYNE 769a

DEPARTMENTAL CORRESPONDENCE

DATE February 21, 1973

200 UNITS, CHARLESTON, SOUTH CAROLINA NAVAL BASE

John Gleason DEP'T

FROM Floyd Payne DEP'T

Preproposal conference was held February 20, 1973, at the above location.

There were approximately 9 groups of contractors present consisting of general and mechanical.

The meeting in general followed the lines used by the Air Force. The Navy representatives opened by laying out the scope of work involved and then followed by a question and answer session. It seems the Navy is more reluctant to commit themselves than the Air Force.

The 1972 program consisting of 280 units is now underway (Jewel Bldrs.) and is made up with 1 and 2 story duplexes. The 1 story buildings are of a plain gable design and the 2 story have a mansard. The exterior coverage is brick. The 1973 program of 200 units will connect to the ones now in progress and the 1974 program of 540 units will follow suit. It was not so stated, but from their conversation it can be assumed they will expect all future units to blend into the present elevations, etc. Jewel Bldrs. are stick building the present job.

We visited the proposed site and it pretty well complements the drawings we have. The site is heavily wooded (18 acres) and minor to major swamp areas. Some areas will have to be undercut and retilled. The drainage is a net work of asphalt coated steel smooth flow pipe. The soil condition is spongy as is typical of most of the Southeastern region near the coast.

The limitation for this project is $19,520.00 per unit ($3,904,000). This compares with the Shaw AFB Project which was $19,208.00 per unit.

The time for completion is 540 days which includes 90 days for plans, etc. However, they did say the working drawings could be approved in Segments.

Extension of proposal time is being considered. However, we should get things rolling with Wiedersum Associates. Wiedersum was not represented at the meeting and we will have to spend considerable time filling them in.

PLAINTIFF'S EXHIBIT

PLAINTIFF'S DEPOSITION EXHIBIT NO.

EXHIBIT 10- MEMO DATED MARCH 12, 1973 TO JOHN K. ABRAHAMSEN

770a

March 12, 1973

REPORT

RE: NATIONAL HOMES
Charleston, South Carolina FPWA No. 7318

On March 6, 1973 at 10:30 A.M., a meeting was held at the Architect's office with the following people present:

Meyers.	Floyd Payne	National Homes
	S. Moy, R.J. Schneca,	FPWA
	R. Brown, W. Laverty,	"
	J. Abrahamsen	"

The purpose of this meeting was to review schematic designs for the project including Site Plan and individual house plans. The following comments were made:

1) Mr. Payne generally approved of our site plan and requested us to combine our units so that we maximize the number of party walls wherever possible.

2) There was a general discussion regarding electrical utilities. It was generally agreed that main service to buildings will be underground to an outdoor equipment enclosure (approximately 6'-0" x 8'-0"), which will house the distribution panels, transformer, etc., to service groups of houses. Site lighting will be also underground with site lighting panels located within the above-mentioned enclosures. The entire site will be master metered.

3) Mr. Payne said that an Addendum to the mechanical requirements would be issued on March 8, 1973.

4) Mr. Payne also stated that there has been an extension with the new date of April 6, 1973, as the date of submission.

5) Before that time, Mr. Payne would like to meet with us once more to review the project (the week of March 19, 1973).

JOHN K. ABRAHAMSEN
Chief Designer
by:

EXHIBIT 23 - LETTER DATED APRIL 3, 1973 FROM ALBERT H. VOORNEVELD 771a
TO JOHN GLEASON

FREDERIC P. WIEDERSUM ASSOCIATES
ARCHITECTS - ENGINEERS

VALLEY STREAM, NEW YORK • TOTOWA, NEW JERSEY

NORMAN J. WIEDERSUM RA
FREDERIC G. WIEDERSUM PE

April 3, 1973

APR 05 1973

PLAINTIFF'S EXHIBIT
23 Y/L 2-24-77
74C 773

Mr. John Gleason, Vice President
National Homes Construction Corp.
Post Office Box 860
Earl Avenue at Wallace
Lafayette, Indiana 47902

Re: Charleston, South Carolina, Dept. of Navy 200
Family Housing Units - FPWA #7318

Dear Mr. Gleason:

Confirming our telephone conversation of yesterday's date, our fee for the above project, if you are the successful bidder, will be $250,000.00, which includes the preparation of all drawings and specifications required and necessary visits to the project during construction.

Lots of luck on this one.

Very truly yours,

Albert H. Voorneveld

ALBERT H. VOORNEVELD
lf

EXHIBIT 24 - LETTER DATED FEBRUARY 24, 1972 FROM ALBERT H. VOORNEVELD TO JOHN GLEASON

FREDERIC P. WIEDERSUM ASSOCIATES
ARCHITECTS - ENGINEERS

VALLEY STREAM, NEW YORK

TOTOWA, NEW JERSEY

F. J. WIEDERSUM RA
FREDERIC G. WIEDERSUM PE

FEB 28 1972

PLAINTIFF'S EXHIBIT
24
74C173

February 24, 1972

National Homes Construction Corporation
Earl Avenue at Wallace
Lafayette, Indiana 47902

Attention of Mr. John Gleason, Vice - President

RE: 200 Family Housing Units, Naval Complex Warminster/Willow Grove, Pennsylvania FPWA #1513

Dear Mr. Gleason:

As we discussed on the telephone, if you are the successful bidder our fee for the above project will be 5% of the construction cost which you have applied to your bid.

Sincerely,

ALBERT H. VOORNEVELD
rg

EXHIBIT 26 - MEMORANDUM DATED JUNE 11, 1971 OF T. FITZPATRICK

NJW-at home via mail NJW-desk LJS

MEMORANDUM
June 11, 1971 (Friday)

TO: NJW

RE: NATIONAL HOMES

1. About 3:30 PM Chuck Kendall called you and left his ~~xxxxx~~ office number in case you should call in, but then changed his mind and said he would be leaving in a few minutes for Los Angeles, and woul you over the weekend - probably Sunday night. I gave him your hom number MA 1 7158.

Then he said that he does want to talk with you and could be in on Monday or Tuesday to see you. I told him that you were scheduled to leave on Tuesday at 4 PM (to go up to Edgemont - per FGW). He said that Monday sounded like a better day and that's probably when he would come in. He did not rescind his earlier statement that he would call you over the weekend.

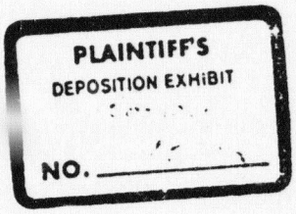
2. At 4:30 PM Jim Woolery called you and asked if you would call him Monday afternoon. He'll be out until 12, so 2 PM our time would be a good time to get him. He said he wants to see if you "would play poker with him..." then explained this means that he wants to ask if you would work with them on another project.

I did not mention to Mr. Woolery that Mr. Kendall had called earlier, as there is no indication that they were necessarily both calling about the same matter.

Jim Woolery: 317 447 3131.

T. Fitzpatrick

NJW FGW___ LJS___ file



MEMORANDUM
June 14, 1971

RE: NATIONAL HOMES CONSTRUCTION CORP. Possible Joint Venture
Contemplated project: for US Navy, site work in New London, Conn.

I returned call of Mr. James Woolery, who had called here on June 11th and left message that he wanted to speak to me about "playing poker with us on a new project."

Mr. Woolery said they will send us criteria for a project in New London for the Navy Department. By June 25th National Homes will know whether they want to go along with submitting a proposal for the project. They have done similar work for the Army at Wright-Patterson Air Force Base.

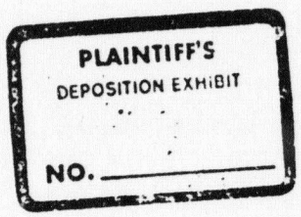
Our participation would be on site development.

I will read the criteria and get back to him to discuss possible J/V proposal. It will be a gamble.

N. J. Wiedersum
f

EXHIBIT 28 - LETTER DATED JUNE 15, 1971 FROM JAMES C. WOOLERY TO NORMAN WIEDERSUM

June 15, 1971



Mr. Norman Wiedersum
Frederic P. Wiedersum Associates
65 Roosevelt Avenue
Valley Stream, New York 11582

Re: Family Housing
U.S. Naval Submarine Base
New London, Connecticut

Dear Norm:

Please find enclosed the bidding information in regard to the above mentioned job.

We are primarily interested in whether you would be willing to do the bidding details on the site development work. We will be in a position by the 25th of June to make the decision as to whether we will continue on this proposal. We intend to use prostituted plans which we have already developed for a DOD job at Wright-Patterson Air Force Base.

Please peruse this criteria on the site work and see if there are any questions that you need answered. I will ask you not to contact the people at New London without my approval since I feel that it will be a big mistake for too many people "stirring this pot" prior to our mutual understanding and agreement to proceed.

I will be in touch with you on or before the 25th with our decision and I hope that you will have a "guesstimate" as to what you feel site work development might cost.

Very truly yours,

NATIONAL HOMES CONSTRUCTION CORPORATION

James C. Woolery

JCW:dmh

Enclosure

PLAINTIFF'S EXHIBIT

EXHIBIT 29 - NOTICE FROM DEPARTMENT OF THE NAVY OF JUNE 15, 1971

776a

DEPARTMENT OF THE NAVY
NORTHERN DIVISION
NAVAL FACILITIES ENGINEERING COMMAND
NAVAL BASE
PHILADELPHIA, PENNSYLVANIA 19112

TELEPHONE NO.
A/C 215
755-3977

PLAINTIFF'S DEPOSITION EXHIBIT NO.

Code 021
N62472-71-R-0285

NOTICE

Subj: Request for Proposals N62472-71-R-0285, 300 Family Housing Units at the U.S. Naval Submarine Base New London, Groton, Connecticut.

This is to advise that the Commanding Officer has rescheduled the hour and date specified for receipt of proposals from 4:30 P.M. (Local Time) 28 July 1971 to 4:30 P.M. (Local Time) 11 August 1971.

Your continued interest in this project is anticipated.

J.G. DILLON, RADM, CEC, USN
For Commander, Naval Facilities
Engineering Command
Contracting Officer

AUTHENTICATED: 15 June 1971

R. R. Dorney
for ALFRED. HORNE, JR.
Director, Contract Division

PLAINTIFF'S EXHIBIT
30 [illegible]
[illegible]

EXHIBIT 30 - MEMORANDUM DATED JUNE 22, 1971 OF T. FITZPATRICK

NJW LJS FGW file

PLAINTIFF'S DEPOSITION EXHIBIT
NO. _____

MEMORANDUM
June 22, 1971

TO: NJW

RE: NATIONAL HOMES
300 Family Housing Units at US Naval Submarine Base, New London, Conn

I called James Woolery this morning in Lafayette, Indiana to ask that he send us a set of dwgs that their previous site engineer prepared for a similar prospective housing project so we could get a better idea of what to expend for the presentation drawings for National Homes' proposal to the Navy.

Mr. Woolery said that they are "into the process of trying to figure out where we stand dollar-wise. Hopefully, we will be able to settle this day or tomorrow. At the present time, if I had to guess, I would say we are not going to proceed with the proposal as it looks like it would run into dollar trouble.

"We don't have a final figure yet, we are working on component figures, but I don't think this will be a good one.

"However, if we decide that we will go ahead with a proposal, we will put the drawings in the mail air mail special delivery and get them to you."

Mr. Woolery understands what dwgs you requested.

He said that they have invested a lot of time in this project so far, but it looks like an expensive one and he doesn't want you to invest any time in it right now.

T. Fitzpatrick

PLAINTIFF'S EXHIBIT 31

EXHIBIT 31 - MEMORANDUM DATED JUNE 24, 1971 of N.J.W.

AVS ✓ NJW ✓ file LJS FGW

PLAINTIFF'S DEPOSITION EXHIBIT NO. 1

MEMORANDUM
June 24, 1971

RE: National Homes Construction Corp.
300 Units of Family Housing at
US Naval Base, New London, Groton, Conn.

I had a call from Mr. Woolery today.

They will not bid on this project.

We can drop all activity.

It is dead.

N.J.W.
f

DEFENDANT'S EXHIBITS

Department of the Navy
Charleston, South Carolina

FREDERIC P WILDERSON — PERIOD ENDING 09/31/74 — PAGE 6

CLIENT REPORT BY EMPLOYEE — CLIENT 7318

NO.	PHASE DESCRIPTION	NO.	EMPLOYEE NAME	WK. END.	CURRENT MONTH HOURS	CURRENT MONTH AMOUNT	YEAR TO DATE HOURS	YEAR TO DATE AMOUNT
***	EMPLOYEE TOTALS ***	102	John Abrahamsen				40.50	565.39
***	EMPLOYEE TOTALS ***	104	Andruso				25.50	363.73
***	EMPLOYEE TOTALS ***	170	Ellmann				23.00	245.64
***	EMPLOYEE TOTALS ***	173	Seimeca				3.00	45.84
***	EMPLOYEE TOTALS ***	182	Van Lintendal				5.00	77.65
***	EMPLOYEE TOTALS ***	304	Lubrala Bear				33.50	455.83
***	EMPLOYEE TOTALS ***	305	~~Jorge~~ Jorge Arabrasoni				22.50	203.43
***	EMPLOYEE TOTALS ***	346	Stanley Mitz				225.50	1,666.45
***	EMPLOYEE TOTALS ***	407	Rita Brown				101.00	921.23
***	EMPLOYEE TOTALS ***	422	Dong-Nguyen Joe				41.00	295.43
***	EMPLOYEE TOTALS ***	445	Eugene Povlitis				83.50	727.27
***	EMPLOYEE TOTALS ***	601	Carmen Sovillo				6.50	41.01
***	EMPLOYEE TOTALS ***	1,601	Neil Heintzey				128.00	925.44
			**** CLIENT TOTALS ****				755.50	6,556.02

DEFENDANT'S EXHIBIT NO.

EXHIBIT D - TALLY SHEET LISTING PLAINTIFF'S EMPLOYEES AND HOURS

779a

EXHIBIT E - MEMORANDUM DATED SEPTEMBER 25, 1974 TO NORMAN J. WIDERSUM FROM ARTHUR VAN SUETENDAEL

DEFENDANT'S EXHIBIT NO. 523

September 25, 1974

MEMORANDUM

TO: NORMAN J. WIEDERSUM

RE: SITE ENGINEERING DESIGN - NAVY HOUSING PROJECT, CHARLESTON, SOUTH CAROLINA, FOR NATIONAL HOMES, FPWA NO. 7318

During the preparation of site plans for submission in regard to the above-referenced project, I prepared a complete set of site drawings, which included the road layout, site grading, and storm drainage.

My total time involved on this project was 105 hours.

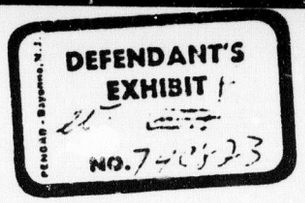
The site design included engineering of the site to approximately balance cuts and fills, as well as the engineering work necessary to insure proper site distances, both vertical and horizontal, and turn radii necessary for emergency vehicles and service vehicles which would be expected to service the project.

Neil Heinberg, Landscape Architect in this office, also spent considerable time drafting on this project.

ARTHUR VAN SUETENDAEL
Site Engineer
dt

cc: FGW, AEF, File

EXHIBIT F - SCHEDULE LISTING HOURS OF WILLIAM G. LAVERTY



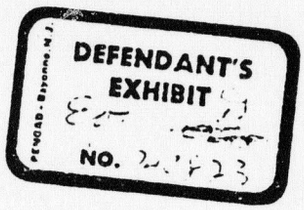
NATIONAL HOMES

Navy Housing - 200 Family Housing, Charleston, South Carolina

WILLIAM G. LAVERTY

		HOURS
1.	January 16, 1973 - sent for Plans and Specification (discussion in office.	2
2.	Letter to John Gleason.	2
3.	Review Plans and Specifications in office--forward copy to National Homes.	4
4.	Call to National Homes February 6, 1973.	1
5.	February 16, 1973 - Reviewed site question with Design and forwarded questions to Floyd Payne by phone.	2
6.	March 6, 1973 - Picked up Floyd Payne for office meeting.	7
7.	March, 1973 - Make arrangements to send plans to National Homes.	2
8.	March 30, 1973 - Put plans on plane; call National Homes.	3
9.	April 4, 1973 - Put plans on plane; call National Homes.	3
10.	July 24, 1973 - Call to Charleston and related happening there, after including 9/12/73 call.	7
	Total Hours:	33

EXHIBIT G - STATEMENT FO TIME ALLOCATION OF A. H. VOORNEVELD



NATIONAL HOMES

Navy Housing - Charleston, S. C. - FPWA #7318

A. H. VOORNEVELD

Aggregate time allocated to project: 40 hours.

EXHIBIT H - REPORT DATED OCTOBER 1, 1974 OF TIME SPENT BY FREDERIC G. WIEDERSUM

DEFENDANT'S EXHIBIT NO. 74

October 1, 1974

REPORT

RE: NATIONAL HOMES PROJECTS

SUBJ: TIME SPENT BY FREDERIC G. WIEDERSUM

Project #R1 - Student Housing: Richard Stockton State College
Rutgers University

December 1970 to the end of January 1971
Reviewing the contract with National Homes with NJW and Ed Walker, our Attorney, and writing a letter to Thomas Eastwood of National Homes: 15 Hours

During the months of June, July and early part of August, daily and weekly reviews of the progress of the drawings and discussions with RJS, LAA, AHV and TMG: 50 Hours

TOTAL 65 Hours

Project #FPWA 1513 - Warminister/Willow Grove, Pa.
200 Units

Review Governmental request for approvals: 3 Hours

Review the NAVFAC Specifications: 7 Hours

Daily and weekly review of the progress of the drawings with our staff between December 1971 and through March 1972: 45 Hours

TOTAL 55 Hours

Project #FPWA 7318 - Charleston, South Carolina
Naval Weapons Station-200 Units

Review the Specifications: 2 Hours

February and March 1973, review of the progress of the drawings with staff and general discussions with staff: 20 Hours

TOTAL 22 Hours

Project - Student Housing: Glassboro, Ramapo College and Montclair

Discussion with staff relative to this project and telephone call from Ewing, Cole, Erdman & Eubank	2 Hours
GRAND TOTAL	144 Hours

dmc
cc: FGW AEF/FILE

EXHIBIT K - MEMORANDUM OF MICHAEL BOLKA (AS ADMITTED INTO EVIDENCE)

DEFENDANT'S EXHIBIT
NO. 74CP23

PLAINTIFF'S
DEPOSITION EXHIBIT
NO. 57

Rough Notes by M. Bolka Charleston SC - Isle Development only.

I. EXCAVATION

Excavation work brings us to a dilemma between Wiedersum and excavating contractor in the area.

Neil Heinburg of Wiedersum indicated to myself that earth work would balance at approximately 20,000 cubic yards. This amount was derived from 20,000 cubic yards of rough grading with a net after compaction of 16,000 cubic yards. This gives us a 20% compaction factor.

Mr. Moore of Island Construction Company and Mr. Fergerson of Colony Construction Company, Inc. indicated that their experience on the base showed that a large percentage of the existing earth on the site would not meet the 95% compaction required. If required compaction could not be met, new fill would be required. New fill would cost $2.10 per truck load per cubic yard F.O.B. This means we would have to add spreading, compaction factor and compaction cost.

In addition, the plans do not indicate how swamp areas are to be treated. In fact, Wiedersum plans don't show the swamp areas which exist on the site.

DEPOSITION EXHIBIT
NO.

Rough Notes by M. Bolka
Charleston SC - File Reference Copies only.

DEFENDANT'S EXHIBIT
NO.

I. EXCAVATION

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In addition, the plans do not indicate how swamp areas are to be treated. In fact, Wiedersum plans don't show the swamp areas which exist on the site.

II. STREETS

There is a discrepancy between the design and construction criteria and Wiedersum's plans in reference to secondary street width. Page 2A-5, Paragraph (1) of the criteria states, "Streets upon which housing units are sited shall provide for on-street parking of service vehicles, guest vehicles, etc."

It is my understanding that secondary streets with parking should be 30' wide. Wiedersum's plans show the street 20' wide with parking lot spaces at different intervals.

III. SIDEWALKS

Sidewalks are to be placed on both sides of the street according to the criteria. If you review the site plans, you will find that sidewalks are not shown in some areas.

In addition to the deletion of sidewalks along the street, ~~you should note~~ there are no walks to the playground and tot lot areas.

IV. STORM DRAINAGE

1. The plans do not show what type of piping material or the size the pipe is to be for the storm drainage.

2. The plans show no details of yards and curb inlets nor the depths of these inlets.

3. It is impossible to determine the dimensions of any of the headwalls.

V. SANITARY SEWER

1. The plans do not indicate what type of materials to use on the sanitary main.

2. There are no details showing manholes nor any indications of the vertical depths for these manholes.

3. The plans show that 4" and 6" force main will be necessary. Unfortunately, there are no details showing what type of pumping equipment nor what quality of equipment should be used. In addition, there are no details showing the structural housing of pumping equipment.

VI. WATER SYSTEM

The only major probem is what type of piping material to install.

VII. GAS DISTRIBUTION SYSTEM

Plans do not indicate what type of material to use for this sytem. At this time, I do not have any idea what type of material to use for gas mains. In my conversations with local people, I have heard conflicting requirements.

VIII. LANDSCAPING

According to the criteria, "Landscape planting design shall consider selection of plant materials that will be easily maintained and that are indigenous to the surrounding natural environment." "Emphasis should be placed upon use of trees, instead of extensive use of shrubs. Size of plants selected should be adequate to give some immediate effect."

When reviewing the "Typical Development Plan" by Wiedersum, you will see that the patio areas are solidified with shrubs and bushes. This is in direct conflict with the Technical Evaluation Manual, page 4 - 8, paragraph 4.

On the other hand, in front of the building, Wiedersum has called for the individual tenants to landscape the private gardens. This also is in direct conflict with the Technical Evaluation Manual.

The Technical Evaluation Manual of the criteria also calls for the sizes of trees, shrubs and other plantings other than grass. Nowhere on the plans does Widersum show these sizes.

COPY RECEIVED

3/15/76

ROGERS & WELLS
ATTORNEYS FOR